1

Supreme Court, U.S.
FILED

No. 931216 JAN 18 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

◆

October Term, 1993

DARBY BOROUGH, DARBY BOROUGH POLICE DEPARTMENT, ROBERT BOYDEN, JOHN CHAPPELLE, CORY KRAMER, JOHN DOE, YEADON BOROUGH, YEADON BOROUGH POLICE DEPARTMENT, ROBERT FRAZIER, JOHN DOE, COLWYN BOROUGH, COLWYN BOROUGH POLICE DEPARTMENT, JOHN DOE, ARTHUR RAFFAELE and SALVATORE NUSAFORO,

Petitioners,

vs.

CHARLES CAIN, Executor of the Estate of DIANE CAIN and CHARLES CAIN, in his own right,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM F. HOLSTEN, II
Counsel of Record
JEFFREY P. HOYLE
HOLSTEN AND WHITE
Attorneys for Petitioners
One Olive Street
Media, Pennsylvania 19063
(215) 566-8800

4698
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

104 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that a release-dismissal agreement is valid only if it can be shown that the prosecutor's subjective motivations are consistent with the public interest reason he proffers as his justification for entering into the release-dismissal agreement?

A. Whether the Third Circuit's subjective analysis is improper under *Rumery*?

B. Whether the Third Circuit erred in finding the Delaware County District Attorney's policy to be insufficient to justify the use of a release-dismissal agreement?

2. Whether the Third Circuit erred in holding that, in order for a release-dismissal agreement to be enforceable, the released civil rights claims must first be investigated by the prosecutor and be found to be marginal or frivolous?

3. Whether the Court of Appeals erred in prohibiting the Petitioners from establishing that the release-dismissal agreement was justified either on the ground that Respondent's claim was frivolous, regardless of the state of the prosecutor's knowledge when the agreement was made, or on other grounds predicated upon factors demonstrating that enforcement of the agreement would further a valid public interest?

4. Whether this Court's decision in *Town of Newton v. Rumery* requires only that it be shown objectively that the release-dismissal agreement was the product of an informed and voluntary decision?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

- A. Procedural History 2
- B. Factual History 3

How the Federal Questions Were Raised and Decided Below 10

Reasons for Granting the Writ 10

- I. The Court of Appeals erred in holding that release-dismissal agreements is valid only if it can be shown that the prosecutor's subjective motivations are consistent with the public interest reason he proffers as his justification for entering into the release-dismissal agreement. 10
  - A. The Third Circuit's Subjective Analysis Is Improper Under *Rumery*. 10

Contents

Page

B. The Third Circuit Erred in Finding the Delaware County District Attorney's Policy to Be Insufficient to Justify the Use of a Release-Dismissal Agreement. 10

II. The Third Circuit erred in holding that, in order for release-dismissal agreement to be enforceable, the released civil rights claims must first be investigated by the prosecutor and be found to be marginal or frivolous. 18

III. The Court of Appeals erred in prohibiting the Petitioners from establishing that the release-dismissal agreement was justified either on the ground that Respondent's claim was frivolous, regardless of the state of the prosecutor's knowledge when the agreement was made, or on other grounds predicated upon factors demonstrating that enforcement of the agreement would further a valid public interest. 21

IV. This Court's decision in *Town of Newton v. Rumery* requires only that it be shown objectively that the release-dismissal agreement was the product of an informed and voluntary decision. 25

Conclusion 30

Page

TABLE OF CITATIONS

Cases Cited:

Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989) 18, 27, 28

Brady v. United States, 397 U.S. 742 (1970) 20

Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993) 19

DeAbadia v. Izquiredo Mora, 792 F.2d 1187 (1st Cir. 1986) 17

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 17

Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989) 13, 16, 17, 18, 19, 28

Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977) 23, 24

Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501 (1984) 24

Santibello v. New York, 404 U.S. 257 (1971) 20

Town ov Newtown v. Rumery, 480 U.S. 386 (1987) . . . . . . *passim*

Venegas v. Mitchell, 495 U.S. 82 (1990) 19

Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1993) . . . 13, 14, 18, 27, 28

Contents

Page

Statutes Cited:

28 U.S.C. § 1254 1

42 U.S.C. § 1983 .... 2, 11

United States Constitution Cited:

Fourth Amendment 2

Fifth Amendment 2

Eighth Amendment 2

Fourteenth Amendment 2

Rule Cited:

Pennsylvania Rule of Criminal Procedure 1100 8

APPENDIX

Appendix A — Opinion of United States Court of Appeals for the Third Circuit Decided October 18, 1993 ...... 1a

Appendix B — Opinion of the United States Court of Appeals for the Third Circuit Filed March 5, 1993 .... 16a

Appendix C — Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania Filed January 17, 1992 .... 54a

Petitioners, Darby Borough, Darby Borough Police Department, John Chappelle, Cory Kramer, Arthur Raffaele, Yeadon Borough, Yeadon Borough Police Department, Sergeant Robert Frazier, Colwyn Borough, Colwyn Borough Police Department and Salvatore Nusoforo pray that a Writ of Certiorari issue to review the Judgment In Banc of the United States Court of Appeals for the Third Circuit filed on October 18,1993.

OPINIONS BELOW

The Opinion of the trial court granting the Petitioners' Motion for Summary Judgment was entered on January 27, 1992. The Opinion is officially reported at 817 F.Supp. 1196 (1992) and is reproduced at App. pp.54a-68a, *infra*.

The Opinion from the panel of the United States Court of Appeals for the Third Circuit filed on March 5, 1993, reversing the trial court's granting of Petitioner's Motion for Summary Judgment is not officially reported and is reproduced at App. pp. 16a-53a.

The Opinion of the United States Court of Appeals for the Third Circuit In Banc was issued on October 18,1993. This opinion is officially reported at 7 F.3d 377 (1993) and is reproduced at App. pp. 1a-15a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit's Opinion reversing the District Court's granting of Petitioners' Motion for Summary Judgment was filed on October 18, 1993. App. pp. 1a-15a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Petitioners having asserted below and asserted herein errors under the law and Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves claims brought under 42 U.S.C. § 1983, alleging the violation of constitutional rights.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Charles Cain ("Respondent") and Diane Cain ("Cain") filed a Complaint commencing this action in the United States District Court for the Eastern District of Pennsylvania on March 12, 1991, challenging Petitioners' conduct in connection with Cain's arrest.[1] The Complaint alleged that Petitioners' conduct with respect to Cain's arrest violated Cain's constitutional and statutory rights in that the arrest: (a) deprived Cain of liberty and property interests without due process of law; (b) was an intentional, deliberate or negligent abuse of governmental power; and (c) denied Cain equal protection of the laws in violation of 42 U.S.C. § 1983.

Petitioners filed an Answer which included the Affirmative Defense that a release- dismissal agreement entered into by Cain and the District Attorney's Office of the County of Delaware barred Cain's claims. Thereafter, Petitioners filed Motions for Summary Judgment based upon the release-dismissal agreement. On September 27, 1991, the court below, by Judge Edmund V. Ludwig, granted Petitioners' Motion for Summary Judgment in its entirety on the grounds that Cain voluntarily, intelligently and knowingly entered into the release-dismissal agreement and that the agreement was valid and enforceable under this Court's holding in *Town of Newton v. Rumery,* 480 U.S. 386 (1987).

---

[1] Diane Cain died on April 19, 1991 of cancer, and the cause of her death was not part of the claims made herein.

On March 5, 1993, a panel of the United States Court of Appeals for the Third Circuit issued an Opinion reversing the grant of summary judgment by the trial court below.

On May 11, 1993, the Third Circuit, In Banc, heard reargument on the grant of Petitioners' Motion for Summary Judgment by the trial court. On October 18, 1993, the Third Circuit issued an Opinion reversing the trial court's grant of summary judgment, holding that the release-dismissal agreement was unenforceable as a matter of law, and remanding the case to the District Court for trial on the merits of Respondent's claims.

B. Factual History

On or about July 4, 1989, Diane Cain was living with her daughter at her home in Darby Borough, Pennsylvania. At the time, Diane Cain had been separated from her husband, Respondent Charles Cain, for approximately six months. During this time, Diane Cain's daughter's boyfriend, Joseph Wettlaufer, was living in a shed next to Diane Cain's home with her permission. (Third Circuit Appendix at 218. Hereinafter, citations to the Third Circuit Appendix shall be referred to as "App. at __"). On the morning of July 4, 1989, Diano Cain observed Wettlaufer in her home holding her purse, and she advised Wettlaufer to put it down and leave. Wettlaufer put the purse down and went to Cain's porch. (App. at 219, 834). Wanting to see and to reconcile with her husband, Charles Cain, and knowing Charles Cain's animosity toward Wettlaufer based upon past experience, Diane Cain called Charles Cain claiming that Wettlaufer had stolen money from her. (App. at 219, 476, 833-834). In response to Diane Cain's call, Charles Cain, as expected, came to her home. Charles Cain caught Joseph Wettlaufer while he was still sitting on Cain's porch and began chasing him down the street. (App. at 835). Once Charles Cain left Diane Cain's home chasing Wettlaufer, Diane Cair became scared that her husband would hurt Wettlaufer. Accordingly, she called the Darby Borough Police Department advising them that Charles Cain had threatened the life of Joseph Wettlaufer, that Charles Cain was in a motor vehicle pursuing Wettlaufer, and that Charles Cain had a handgun in his possession. (App. at 219, 619-620). Despite the fact that Wettlaufer had not taken any money from her, Diane Cain also advised the police that Wettlaufer had stolen money from her wallet. (App. at 837).

Thereafter, in response to Diane Cain's call, police officers from the Darby, Yeadon and Colwyn Borough Police Departments[2] made a lawful stop and lawful arrest of Charles Cain in the parking lot of a public shopping center. (App. at 619-620). While the Darby, Yeadon and Colwyn Borough Police officers were securing the scene of the arrest of Charles Cain, Diane Cain arrived at the shopping center parking lot, pulled her motor vehicle up next to her husband's car and demanded to speak with her husband. Diane Cain was advised that her husband was in custody and was asked by the police to leave the scene. (App. at 621-622). Diane Cain refused, shouting obscenities at the police officers. (App. at 621 622). Because this incident took place in the parking lot of a shopping center in a residential neighborhood, small children were in the immediate area and could hear what Ms. Cain was saying.[3] (App. at 719). After being told several times to leave the scene and refusing, Diane Cain was advised that she was under arrest. (App.

---

[2] These communities had a "mutual assist" agreement calling for aid from neighboring departments when additional manpower was needed.

[3] Diane Cain's statements included calling the police officers "asshole", yelling "go fuck yourself" and "fuck you asshole." (App. at 719).

at 622-623). A Darby police officer then put his hand into Diane Cain's motor vehicle, which was running, in an effort to turn off the engine. At that time, Diane Cain bit the officer's arm as hard as she could. (App. at 623, 625-626). Attempts were then made to remove Diane Cain from her vehicle, and she continued to resist arrest and struggled with the officers as they attempted to remove her from her car. (App. at 624-626). Eventually, a stun device was used to control and subdue Cain.

As a result of this incident, an Affidavit of Probable Cause was issued for the arrest of Diane Cain on the following charges: three (3) counts of aggravated assault, three (3) counts of simple assault, resisting arrest and disorderly conduct based upon the facts more fully set forth in the Affidavit of Probable Cause. (App. at 719).

At the time of her arrest, Diane Cain had a close, personal friendship with Darby Police Chief Robert Smythe and several senior members of the Darby Police force with whom she had grown up. (App. at 222, 225, 247, 461-464, 485, 627-628). Within days of this incident, Diane Cain admitted to her brother, Darby Borough Council President Nick DiGregorio, and to her close friend, Chief Smythe, that she knew she was wrong, that she was sorry the incident had occurred, and that she hoped it would not hurt her friendship with the police and those individuals. (App. at 217-225, 475, 484-485). In these conversations, Diane Cain maintained that she had not been herself at the time of the incident because of medication she was taking for cancer. (App. at 475-480, 484-485). In these conversations, Diane Cain did not threaten to sue the police nor did she claim that the police used excessive force in effectuating her arrest. (App. at 217-220, 233-234, 521). Rather, Diane Cain bragged about how many police officers it took to hold her down during her efforts to resist arrest. (App. at 219, 244).

Prior to her arrest on July 4, 1989, Diane Cain was for many years involved in the local Darby Borough political process, working at polling places for political candidates including the campaigns of her brother, Nick DiGregorio. (App. at 215-217, 627). At the time of Diane Cain's arrest, Diane Cain's brother was the President of the Darby Borough Council and had been a councilman for many years (App. at 215). Darby Borough is a small Delaware County community adjoining Philadelphia County with an area of roughly eight tenths of a mile square and a population of twelve thousand citizens. (App. at 485, 489-490).

At the time of this incident, Diane Cain and her husband, Charles Cain, had been separated for six months. Diane Cain's brother described the Cains' marriage as, *inter alia*, "[a] lot of physical confrontations, periods of separation, lack of financial support." (App. at 223-224). Prior to her arrest of July 4, 1989, Diane Cain had been arrested on three prior occasions for retail theft. (App. at 272). Those arrests took place on December 7, 1982, April 4, 1983 and November 30, 1987. Additionally, Diane Cain is known to have stabbed her husband on two occasions. (App. at 224, 481). Neither stabbing incident resulted in the filing of criminal charges. (App. at 481). As a result of Diane Cain's arrest for retail theft on November 30, 1987, Diane Cain was given Accelerated Rehabilitative Disposition (ARD) on or about April 13, 1988.

Beginning immediately after her arrest on July 4, 1989, Diane Cain, Charles Cain and relatives of Diane and Charles Cain, attempted to intercede on Diane Cain's behalf in efforts to use Diane Cain's and Charles Cain's acquaintance and/or personal or familial relationship with local politicians and law enforcement officers to obtain a favorable resolution of the criminal charges pending against Diane Cain. (App. at 631-633). Efforts were made by relations of both Diane and Charles Cain to reach Diane's brother, Darby Council President, Nick DiGregorio, and Darby Police Chief Robert Smythe. (App. at 631-633). Eventually, Diane Cain spoke to her brother and Darby Police Chief Smythe apologizing for the incident, asking how she could resolve all charges favorably. (App. at 225, 466, 475-480). Chief Smythe told Cain he would see what he could do for her but stated that the officers would have to be protected from a civil lawsuit by Cain. (App. at 482-484). Smythe also advised Cain to retain an attorney. (App. at 482).

On or before July 10, 1989, both Diane Cain and her husband, Charles Cain, retained attorney G. Guy Smith, Esquire, to represent them on the criminal charges brought against them as a result of their arrests on July 4, 1989. (App. at 353). G. Guy Smith is an experienced criminal attorney admitted to the Pennsylvania Bar in 1968, who has served both as an Assistant Public Defender and an Assistant District Attorney for several years, as the solicitor for the Borough of Swarthmore from 1978 to 1987, and presently serves as Swarthmore's Mayor. (App. at 352, 385). Smith's practice consists primarily of civil and criminal trials, personal injury and negligence. (App. at 352, 385).

At one of the dates scheduled for Diane Cain's preliminary hearing, her attorney Mr. Smith, spoke with the Darby Police in an effort to negotiate a plea or "deal" whereby Diane Cain would be accepted into an ARD program. (App. at 354-355, 473). By letter dated July 24, 1989, Mr. Smith wrote to Cain advising her that "the police have told me that they are not interested in any negotiated plea or any other kind of 'deal' ", (App. at 358-359, 372, 582). On one of the next dates of Diane Cain's Preliminary Hearing, however, the charges of aggravated assault were withdrawn at the request of the Darby Police, and Diane Cain waived a Preliminary Hearing on all other charges. (App. at 354). The aggravated assault charges were dropped so that Diane Cain would be eligible for an ARD program which precludes admission of people charged with felonies. (App. at 354-355). At the time of this scheduled preliminary hearing, Diane Cain's attorney, Mr. Smith, advised her that if she wished to be given ARD, the police would want a release of civil liability. In response, Diane Cain stated that she wanted ARD. (App. at 355 358). On or about August 25, 1989, as a result of Diane Cain's decision to "go for ARD", a conflict developed which caused the Cains' attorney to "split" their files. (App. at 350-351, 582). Charles Cain intended to proceed to trial and did so. (App. at 268-270).

On or about September 19, 1989, Diane Cain and her attorney entered into an agreement to waive Diane Cain's speedy trial rights under Pa. R. Crim. Proc. Rule 1100 in exchange for being considered for the ARD program. (App. at 721). At the same time, Diane Cain and Smith completed Delaware County's ARD application known as a Criminal History Statement. (App. at 723). In that application, Diane Cain indicated to Smith that she had never been arrested or charged with any criminal offense. (App. at 361, 723). The Delaware County prosecutor in charge of the ARD program relied upon Diane Cain's Criminal History Statement in authorizing Diane Cain's admission into the ARD program. (App. at 271). Had the past criminal history of Diane Cain been known, she would not have received ARD. (App. at 272). Upon granting Diane Cain's ARD application, Mr. Punshon made an indication on his file sheet that a civil release would be required.[4] (App. at 285). Diane Cain and her attorney, were advised of the District Attorney's agreement to accept Diane Cain into the ARD program by a mailing dated September 29, 1989. (App. at 724).

On or about October 18, 1989, Diane Cain appeared before the Honorable Rita E. Prescott in the Delaware County Court of Common Pleas and was represented by Donna Zaccaria, Esquire, an attorney in Mr. Smith's law office. (App. at 409, 420-423). At the ARD hearing, a colloquy of Diane Cain's plea agreement occurred before the court. During the colloquy, Diane Cain's attorney and Diane Cain acknowledged that they had been explained Diane Cain's rights and obligations in the ARD program, all of the terms and conditions of the program, and the court was advised that Cain had released the police from all civil liability as part of the agreement reached placing her in the ARD program. (App. at 674, 725-730).

---

[4] Prosecutor Punshon testified *briefly* regarding the policy of the Delaware County District Attorney's office to not offer ARD to individuals involved in certain types of offenses such as domestic disputes where police officers were required to make arrests of disturbed or intoxicated individuals. Portions of Punshon's testimony are cited by the Third Circuit in its Opinion at App. 8a-9a.

Prior to the aforementioned colloquy, on or about October 18, 1989, Diane Cain and her attorney, completed and signed a General Release. (App. at 437-438, 731). Prior to both Diane Cain's and Zaccaria's signing of said Release, attorney Donna Zaccaria reviewed the Release line by line, with Diane Cain and Zaccaria fully explained the implications and consequences of the Release, stating to Cain that it would preclude her from suing *any* of the individual police officers and departments involved in the incident. (App. at 442, 447, 480, 491). Zaccaria further stated that Diane Cain signed the Release in her presence and that she (Donna Zaccaria) believed Diane Cain fully understood the Release. (App. at 480, 481, 731). All handwriting on the Release, except for Diane Cain's signature, is that of Donna Zaccaria and Zaccaria intended to include the names of all police officers and departments involved, but she wrote only the names of the officers and police department within whose jurisdiction the arrest was made because that was the information which appeared in official paperwork in her possession. (App. at 434, 447).

Diane Cain's husband, Respondent, Charles Cain, chose to go to trial on the charges filed against him as a result of the July 4, 1989 incident and was found guilty of some charges. (App. at 268-270). Suit was filed in this matter fifteen months after this Release was signed, one month before Diane Cain's death from cancer. The Plaintiff's Complaint did not acknowledge the existence of the Release nor did it challenge the policy or conduct of the prosecutor in obtaining it.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions raised herein were raised initially in the trial court. The trial court granted Petitioners' Motion for Summary Judgment. The issues raised herein were again raised on direct appeal to the Third Circuit. A panel of the Third Circuit reversed the grant of summary judgment by the trial court. Upon reargument in banc, the Third Circuit again reversed the grant of summary judgment by the trial court and remanded the matter for trial, holding that, as a matter of law, the release-dismissal agreement was unenforceable.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT A RELEASE-DISMISSAL AGREEMENT IS VALID ONLY IF IT CAN BE SHOWN THAT THE PROSECUTOR'S SUBJECTIVE MOTIVATIONS ARE CONSISTENT WITH THE PUBLIC INTEREST REASON HE PROFFERS AS HIS JUSTIFICATION FOR ENTERING INTO THE RELEASE-DISMISSAL AGREEMENT.

A. The Third Circuit's Subjective Analysis Is Improper Under *Rumery.*

B. The Third Circuit Erred in Finding the Delaware County District Attorney's Policy to Be Insufficient to Justify the Use of a Release-Dismissal Agreement.

All parties and the courts below agree that the issue of the validity of the release-dismissal agreement signed by Çain is governed by this Court's decision in *Town of Newton v. Rumery,* 480 U.S. 386 (1987).[5] In *Rumery*, this Court held that there is no *per se* rule against agreements whereby prosecutors drop criminal charges in exchange for the release of a citizen's right to sue. *Id.* at 397. In *Rumery*, Bernard Rumery was charged with tampering with a witness when he allegedly threatened to harm the complaining witness in a sexual assault case if she testified against Rumery's friend. Rumery's lawyer then threatened a civil lawsuit against the Town of Newton unless the state agreed to drop the charges against Rumery. After some negotiations between Rumery's attorney and a Deputy County Prosecutor, the parties reached an agreement under which the charges against Rumery would be dropped if Rumery agreed not to sue the town, its officials, or the complaining witness. Rumery's attorney then drafted the agreement which was approved by the Deputy Prosecutor and presented to Rumery. After discussing the agreement with his attorney for one hour and considering the agreement for three days, Rumery signed it. The charges against Rumery were dropped, but ten months later, he sued the Town of Newton anyway under 42 U.S.C. § 1983.

The District Court's Order dismissing the suit on the basis of the release-dismissal agreement was reversed by the First Circuit Court of Appeals, which found all release-dismissal agreements *per se* invalid as against public policy regardless of whether the agreement was "voluntary". This Court, in reversing and remanding for dismissal of the Complaint, noted that a *per se* rule is unwarranted when a release is entered into voluntarily and not as the result of prosecutorial misconduct, particularly where there was no evidence that any relevant public interests would be adversely affected by enforcement of the agreement. *Id.* at 397-98. This Court specifically held that the agreements themselves do not violate public policy, but rather, can further significant public interests. *Id.* at 392. The prosecutor in *Rumery* stated that a "significant consideration" for entering into the agreement was to avoid making the prosecution's witness testify publicly at two trials. *Id.* at 398. The Court did not examine the strength of the prosecutor's case against Rumery, the validity of Rumery's claims against the state, or the investigation undertaken by the prosecutor into Rumery's claims.

---

[5] As the district court notes below, in Cain's criminal case, unless she violated her Accelerated Rehabilitative Disposition (ARD) probation, the eventual result was dismissal of the charges. Pa. R. Crim. P. 185. (App. at 63a). The validity therefore of this release must be determined based on the analysis of this Court in *Newton v. Rumery*.

The prosecutor in the instant case stated that a policy had been developed by the district attorney's office to offer ARD (thereby reducing the district attorney's and court's caseload) in certain types of cases subject to abuse on the civil side, in exchange for a release in order to avoid subjecting the state to "ofttimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion. " (App. at 268-269).

In its Opinion below, the Third Circuit acknowledged that "[t]he Court in *Rumery* recognized that there can be a valid law enforcement interest in preventing the public fisc from being wasted by defending *frivolous* lawsuits." (emphasis added).[6] App. at 7a. The Third Circuit's Opinion states that this interest may be sufficient to justify judicial enforcement of a release-dismissal agreement "if the time and expense of defending such a suit actually motivated a prosecutor's decision to drop criminal charges in exchange for the Defendant's release of civil rights claims, then the prosecutor is presumably making the decision, not out of concern for the private interests of government officials, but rather out of concern for the public interest in preserving govermnental resources." *Id.* At this point, the Third Circuit's reasoning begins its significant departure from this Court's reasoning in *Rumery* and its Circuit Court progeny. *Rumery* focused not on the possible subjective motives of the prosecutor, but on the objective reasons given by the prosecutor and whether those reasons could reasonably be said to be in the public interest. *See also, Lynch v. City of Alhambra,* 880 F.2d 1122, 1128 (9th Cir. 1989)(the test "is whether the public interest is served by the agreement, not whether the prosecutor acted with pure motives."). The Third Circuit ignores *Rumery* by seeking to superimpose a subjective standard over the limited objective scrutiny established by *Rumery.* The Third Circuit states:

---

[6] For purposes of this section only, Petitioners assume *arguendo* that this Court's decision in *Rumery* requires the Petitioners to show a public interest favoring enforcement of the Release.

> The standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the decision was reached. *Additionally, the public interest reason proffered by the prosecutor must be the prosecutor's actual reason for seeking the release.*

App. at 8a (emphasis added).

At this point, the Third Circuit completely ignores this Court's admonition that "courts normally defer to prosecutorial decisions as to whom to prosecute . . . the mere opportunity to act improperly does not compel the assumption that all — or even a significant number of — release-dismissal agreements stem from prosecutor's abandoning 'the independence of judgment required by [their] public trust.' " *Id.* at 396-97.

In *Woods v. Rhodes,* 994 F.2d 494 (8th Cir. 1993), the Eighth Circuit cites several other examples of acceptable prosecutorial concerns as set forth by this Court in *Rumery.* These concerns include:

> The cost and burden of litigating lawsuits, *Rumery,* 480 U.S. at 395, 107 S.Ct. at 1193;

> *Hammond v. Bales*, 843 P.2d 1320, 1322 (10th Cir. 1988); Docket control and efficient resolution of criminal charges, *Rumery*, 480 U.S. at 395, 107 S.Ct. at 1193; *Hammond*, 843 F.2d at 1322 and the avoidance of questionably valid civil rights litigation, *Rumery*, 480 U.S. at 395, 107 S.Ct. at 1193. Additional factors bearing on prosecutorial overreaching include the nature of the criminal charges, *Rumery*, 480 U.S. at 401, 107 S.Ct. at 1196 (O'Connor, J., concurring); and whether prosecution was threatened before or after the prosecutor learned of the civil rights litigation, *Lynch*, 880 P.2d at 1129.[7]

Woods v. Rhodes, 994 F.2d at 500.

In this case, the District Attorney's Office had legitimate concerns regarding docket control, litigation costs, implementation of its ARD program and the resolution of the criminal charges against Cain. In this regard, Delaware County Assistant District Attorney, W. Wayne Punshon, testified at a hearing on Petitioners' Motion for Summary Judgment as follows:

---

[7] In the instant case, it is important to note that during the pendency of her criminal charges, Cain had not made a claim of police misconduct in the events surrounding her arrest, nor had she threatened a civil lawsuit. Cain's criminal attorney, G. Guy Smith, Esquire, Cain's brother, Nick DiGregorio, and Darby Borough Police Chief Smythe, a close personal friend of Cain's, testified that Cain told them in detail the facts of her arrest, showed them marks on her body caused by her struggle with police, but never claimed that the police used excessive force. (App. 217-221, 243-244, 217-221, 243-244, 275-480, 496). In fact, Cain boasted to her brother and to Chief Smythe about how many police officers it took to restrain her, and while doing so, admitted her fault and guilt in the incident and asked what she could do to have the charges resolved as favorably as possible. (App. at 219, 239, 240, 482). Moreover, at no time during any of these discussions with her attorney, police, or the District Attorney did she threaten a civil lawsuit or claim police misconduct. (App. at 225, 233-237, 327, 483, 521, 524).

> Insofar as ARD is concerned, as His Honor well knows, the ARD program is to bypass the litigation that is involved in a criminal prosecution; suppression motions on (sic) those pre-trial motions and so forth, and to proceed directly to what would likely be the outcome of the case in order to cease the burden of case loads on the courts.
>
> In conjunction with that, it is in the interest of the prosecutor's office and the police to avoid the needless litigation, the off times (sic) frivolous actions that are brought and resolve the entire matter at the time of the ARD hearing in an amicable fashion. That is why a Release is required from situations where it may be reasonably anticipated that litigation will subsequently arise after the individual is given ARD.
>
> It would, indeed, be somewhat of a disservice to the law enforcement community to offer this individual a program by which she avoids prosecution and she avoids conviction only to have her turn around not as contrite as she appeared to be at the time she went into the ARD program, and to bring lawsuits against the police departments that were involved.
>
> In this particular kind of a case, what we are dealing with here is a domestic situation where, undoubtedly, emotions run high. We are dealing with — I don't know what percent — in an extraordinary high percent of the cases

> where the people, the Complainants or the Defendants are intoxicated. And they may very well remember things differently — I am not saying that in this particular case, but I am talking about this class of cases. So, the idea is that even though they may very well believe that the facts were such and such, we are dealing with a District Justice's prima facie determination that a crime was committed by the Defendant.

(App. at 268-269).

The Third Circuit's "actual reason" test would call into question, and make subject to proof, each of these otherwise valid public purposes for the use of release-dismissal agreements. This would be a publicly intrusive, unwarranted and wholly unjustified invasion and erosion of the prosecutorial function. Clearly, the Third Circuit goes impermissibly beyond the holding of this Court in *Rumery* when it states that the public interest reason proffered by the prosecutor must be proven to be the prosecutor's *actual reason* for seeking the release. This approach has not been adopted by any Circuit Court and has been specifically rejected by the Ninth Circuit in *Lynch v. City of Alhambra*, 880 P.2d 1122 (9th Cir. 1989) where the court opined that the test associated with the public interest and prosecutorial misconduct concerns as announced in *Rumery* is "whether the public interest is served by the agreement, not whether the prosecutor acted with pure motives." *Lynch v. City of Alhambra*, 880 F.2d at 1128.

In *Rumery*, this Court enforced a release-dismissal agreement because *Rumery* voluntarily signed the agreement, and there was no evidence of prosecutorial misconduct in the prosecutor's decision to seek the release. *Rumery*, 480 U.S. at 398. *Rumery* requires only that the prosecutor have an independent, legitimate reason to enter into the agreement and that the reason directly relates to his prosecutorial responsibilities. *Id.* at 398. Nowhere in *Rumery* did the Court suggest that the prosecutor's state of mind must be proven to be in the public interest. Accordingly, the Court of Appeals below misinterprets this Court's analysis in *Rumery* when it states that "the issue is not what the prosecutor might or could have thought; it is what actually motivated him or her in seeking a particular release." App. at 8a. The Court of Appeals should not have been concerned with the correctness of the prosecutor's determination, nor his subjective state of mind, but with the objective reasonableness of his conduct. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See also, DeAbadia v. Izquiredo Mora*, 792 F.2d 1187, 1193 (lst Cir. 1986).

In the instant case, the prosecutor was following a longstanding prosecutorial policy which he perceived to be applicable to Cain's request for ARD. The validity of this policy was never challenged in the Respondent's Complaint and was only briefly testified to at the hearing held by the District Court. The Third Circuit's characterization of this policy as "wholly and patently unrelated to the goals of ARD" is clearly an unsupported conclusion based upon the limited record, and ignores the valid public purposes that the prosecutor briefly stated that the policy was intended to serve.

In short, the Third Circuit's holding that the prosecutor's subjective motivation in entering into the release agreement is the standard for determining whether a release agreement is valid, conflicts directly with this Court's analytical approach in *Rumery* and the analytical approach being developed among the Circuit Courts.

In the case at bar, this Court should grant certiorari to resolve the conflict between the Court of Appeals for the Third Circuit and this Court's analysis in *Rumery* and to resolve the conflict among the Circuits which this case creates.

II.

THE THIRD CIRCUIT ERRED IN HOLDING THAT, IN ORDER FOR A RELEASE-DISMISSAL AGREEMENT TO BE ENFORCEABLE, THE RELEASED CIVIL RIGHTS CLAIMS MUST FIRST BE INVESTIGATED BY THE PROSECUTOR AND BE FOUND TO BE MARGINAL OR FRIVOLOUS.

The Court of Appeals below stated, "[W]e believe that under *Rumery* there must first be a case-specific showing that the released civil rights claims appear to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by that reason." App. at 12a. This assertion is wholly unrealistic[8], conflicts directly with this Court's decision in *Rumery*[9] and has not been a criterion in any Circuit Court decision made after *Rumery, See, e.g., Woods v. Rhodes,* 994 F.2d 494 (8th Cir. 1993); *Berry v. Peterson,* 887 F.2d 635 (5th Cir. 1989); *Lynch v. Alhambra,* 880 F.2d 1122 (9th Cir. 1989). The Sixth Circuit, in a case of first impression in that Circuit, observed that in absence of

---

[8] Such a requirement could never be accomplished. No competent criminal defense counsel would permit a prosecutor to interview the defendant, and no competent prosecutor would conduct extensive, discoverable interviews inquiring into possible misconduct or inconsistencies in the testimony of key prosecution witnesses. Most cases rely upon credibility, not the nature or amount of physical or claimed emotional injury. The court cannot ignore the role of competent counsel representing the defendant in assessing the merits of the defendant's potential civil rights claims and to advise the defendant properly.

[9] This court in *Rumery* made no finding regarding the merits of Rumery's civil rights claims. The majority observed that Rumery voluntarily agreed to criminal immunity "in consideration of abandoning a civil suit that he may well have lost." *Id.* at 394. Justice Stevens, writing for the minority sets forth a strong argument that Rumery's civil claims did in fact have merit. *Id.* at 404-407. Importantly, the prosecutor made no reported investigation into the merits of Rumery's claims and this Court did not require him to do so.

"substantial evidence of police misconduct" (which could be used as evidence of prosecutorial misconduct) where police misconduct is alleged but cannot be ascertained as true, "release-dismissal agreements can allow prosecutors to 'achieve rough justice where the 'true' facts of the case are not known' by 'allow[ing] everyone to declare the case a draw and go home.' " *Coughlen v. Coots*, 5 F.3d 970 (6th Cir. 1993) (quoting *Lynch supra*). In the instant case, Cain made no complaint of police misconduct and no secret of her regret and remorse for having fought with police officers — despite her initial bragging about it to the police chief.

In the present matter, Diane Cain made a voluntary decision that she wished to forego the possibility of these theretofore, undisclosed civil rights claims in exchange for no criminal prosecution. This Court has clearly stated in both *Rumery* and *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990) that she has the individual right to negotiate these claims whether frivolous or meritorious[10].

The release-dismissal agreement which Cain entered into here also differs importantly from that in *Rumery*, and more properly resembles a plea bargain which requires less scrutiny into its validity.[11] The charges against Cain were not resolved merely by dismissal. Cain was placed into an ARD program which conditioned the dismissal of charges upon her serving a period of probation. If Cain violated the conditions of the program, the criminal charges against her would have been reinstated despite the fact that she had signed a civil release. Under these circumstances, this agreement is the equivalent of a plea bargain expressly authorized by the Supreme Court. *Brady v. United States*, 397 U.S. 742 (1970); *Santibello v. New York*, 404 U.S. 257 (1971). As with plea bargains, in the instant matter, there was judicial supervision over Cain's placement into the ARD program, including a colloquy wherein Cain acknowledged a degree of guilt, confirmed her waiver of certain constitutional rights associated with placement into the program, and the court was advised by Assistant District Attorney Punshon that Cain had released the police from all civil liability. (App. at 725-730).

---

[10] "Rumery had no public duty to institute a § 1983 action merely to further the public's interest in revealing police misconduct. Congress has confined the decision to bring such actions to the injured individuals, not the public at large. Thus, we hesitate to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement." *Rumery, supra*, at 395.

[11] See, *Rumery*, at 409-410 (the "voluntary, deliberate, and informed character of a Defendant's decision generally provides an acceptable basis for upholding the validity of a plea bargain.") (Stevens, J., dissenting).

In conclusion, the Third Circuit, in announcing a *per se* rule of invalidity unless the prosecutor shows that the released civil rights claims appear to be marginal or frivolous at the time the agreement was made, improperly assumes prosecutorial misconduct (an assumption of which this Court disapproved in *Rumery*, 480 U.S. at 395) and requires that the District Attorney's Office engage in an individualized analysis of Cain's civil rights claims before obtaining a release-dismissal agreement from her. None of the opinions written by this Court in *Rumery* require such an individualized inquiry. Rather, the case-by-case approach adopted by this Court in *Rumery* requires only all individualized analysis of the facts comprising the arms length negotiations between the prosecutor and the defendant's attorney underlying the decision to enter the release agreement. Because neither the majority nor the plurality opinion of this Court in *Rumery* requires that the District Attorney find that the released civil rights claims of the respondent appear to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason, the Court of Appeals' decision below conflicts directly with this Court's analysis in *Rumery*.

In the present case, this Court should grant certiorari to resolve the conflict between the Court of Appeals' decision below and this Court's decision in *Rumery*, and refuse to require the Petitioner to show that Respondent's released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason.

III.

THE COURT OF APPEALS ERRED IN PROHIBITING THE PETITIONERS FROM ESTABLISHING THAT THE RELEASE-DISMISSAL AGREEMENT WAS JUSTIFIED EITHER ON THE GROUND THAT RESPONDENT'S CLAIM WAS FRIVOLOUS, REGARDLESS OF THE STATE OF THE PROSECUTOR'S KNOWLEDGE WHEN THE AGREEMENT WAS MADE, OR ON OTHER GROUNDS PREDICATED UPON FACTORS DEMONSTRATING THAT ENFORCEMENT OF THE AGREEMENT WOULD FURTHER A VALID PUBLIC INTEREST.

This Court announced, at the outset of its analysis in *Rumery*, that common law contract principles govern the enforceability of release dismissal agreements such as the agreement at issue in the present case. Specifically, the majority in *Rumery* stated that:

> The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. 480 U.S. at 392. Citing, Restatement (Second) of Contracts § 178(1)(1981).

For this same reason, the Court of Appeals erred in failing to remand this case to the District Court to give the Petitioners the opportunity to establish that the release-dismissal agreement was justified either on the ground that Cain's claim was frivolous, regardless of the state of the District Attorney's knowledge when the agreement was made, or on some other grounds predicated upon other factors demonstrating that enforcement of the agreement would further a valid public interest.

This remand order which Petitioners seek is in accordance with the principles enunciated by this Court in *Rumery* and with the concurring and dissenting opinion of Judge Greenberg in which Judge Alito joined in the court below. Judge Greenberg stated:

> I believe that ordinary contract principles and simple fairness require the remand I envision. The Appellants, though challenging the validity of the Agreement, cannot deny that Ms. Cain received from it the benefit of being accepted into the ARD program, which was the outcome she sought of the criminal proceeding. Accordingly, the Appellants are in a position similar to that of parties to a contract who, if they seek its rescission, usually are required to return the benefits they received from the agreement. This principal is hardly new, for as long ago as 1886 the Court of Errors and Appeals of New Jersey was able to say that "[i]t is a well-settled principal of law and equity that a party cannot rescind a contract by his own will, and at the same time keep possession of the consideration, in whole or in part, which he has received under it." *Doughten v. Camden Bldg. and Lone Ass'n*, 7 A. 479, 480 (1886). But the Appellants cannot offer to return the benefit Ms. Cain received from the contract because she is dead and the prosecution cannot be reinstituted. In these

> circumstances, the Appellees should be permitted to justify the release-dismissal agreement on grounds alternative to the blanket policy.
>
> *In reaching this conclusion, I have not overlooked the fact that the [Respondents] now establish that the agreement was valid, they will be relying on a justification identified after Ms. Cain and the district attorney agreed to it. But there is nothing unusual in permitting an after-the-fact inquiry into whether a public official 's actions, which were in fact based an an improper predicate, could have been justified for other reasons and therefore validated. See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977).

App. at 14a-15a. (emphasis added).

In *Mt. Healthy*, an untenured school teacher, who had previously been involved in an altercation with another teacher, an argument with school employees, an incident in which he swore at students, and an incident in which he made obscene gestures to female students, brought an action against the School District Board of Education. The Board refused to rehire the teacher after he made a telephone call to a radio station and conveyed the substance of a memorandum that the school principal had circulated to various teachers relating to teachers' dress and appearance. The school board cited the plaintiff's lack of tact in handling professional matters, with specific mention of the radio station and obscene-gesture incidents as reasons for not rehiring the plaintiff. Plaintiff, thereafter, brought suit, claiming that the school district's refusal to rehire him violated his rights under the

First and Fourteenth Amendments. The District Court found that the incidents involving theplaintiff were clearly protected by the First Amendment and that they played a substantial part in the school district's decision not to rehire the plaintiff. The Court of Appeals affirmed.

The Supreme Court in *Mt. Healthy* held that, although the conduct protected by the First and Fourteenth Amendments played a substantial part in the decision not to rehire the plaintiff, this alone did not amount to a constitutional violation justifying remedial action. Rather, the District Court should have gone on to determine "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." *Mt. Healthy City School District v. Doyle,* 429 U.S. at 287.

Justice O'Connor alluded to this after-the-fact justification of release-dismissal agreements in her concurring opinion in *Rumery.* O'Connor noted the prosecutor's concern that the complaining witness against *Rumery* would be forced to testify in criminal and "presumably in later civil" proceedings. *Rumery,* 480 U.S. at 403. (O'Connor, J., concurring).

The remand order which Petitioner now seeks in accordance with the principles established in *Rumery, Nix v. Williams* and *Mt. Healthy v. Doyle* was followed by the Ninth Circuit Court of Appeals in the case of *Lynch v. City of Alhambra,* 880 F.2d 1122 (1989). In *Lynch,* the plaintiff filed suit under 42 U.S.C. § 1983. The Complaint was dismissed by the District Court. The Court of Appeals reversed the District Court and remanded the action to the District Court to determine whether or not the release-dismissal agreement signed by Lynch violated any public policy. *Id.* at 1129. In remanding to the District Court to make such a determination, the Court of Appeals noted the permissive language contained within Justice O'Connor's analysis in *Rumery.* Justice O'Connor wrote:

> The defendants in a 1983 suit *may* establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest.

480 U.S. at 401. In keeping with this language from *Rumery*, the Court of Appeals remand order should have permitted the Petitioners to establish that the release entered into between Cain and Delaware County was in accordance with the principles established in *Rumery* despite its opinion that the prosecutor's policy itself was "insufficient . . . [to] support a determination that the public interest requirement of *Rumery* has been satisfied." App. at 12a.

In short, the Third Circuit's remand order is not in line with the analytical approach applied by this Court in *Rumery*, nor with the analytical approach being developed among the Circuits.

In the case at bar, this Court should grant certiorari to resolve the conflict among the Circuits which the decision of the Court of Appeals creates and should decide Petitioners' arguments consistent with the rules and principles announced by this Court in *Rumery* and with the rules and the principles emerging among the other Circuits.

IV.

THIS COURT'S DECISION IN *TOWN OF NEWTON V. RUMERY* REQUIRES ONLY THAT IT BE SHOWN OBJECTIVELY THAT THE RELEASE-DISMISSAL AGREEMENT WAS THE PRODUCT OF AN INFORMED AND VOLUNTARY DECISION.

The majority opinion of the court below assumes that the release-dismissal agreement entered into between Cain and the District Attorney's Office was executed voluntarily. App. at 6a. The concurring and dissenting opinion would affirm the District Court's finding that the release was entered into voluntarily. App. at 1a-15a. The court below states, however, that it has determined that simply showing that the agreement was voluntary is not sufficient to validate it, stating that, "[T]he *Rumery* majority specifically left that question open." App. at 6a.

What the majority in *Rumery* actually stated, however, was:

> We note that two Courts of Appeals have applied a voluntariness standard to determine the enforceability of agreements entered into *after* trial, in which the Defendants released possible Section 1983 claims in return for sentencing considerations. See, *Bushnell v. Rosetti,* 750 F.2d 298 (CA 4 1984); *Jones v. Taber,* 648 F.2d 1201 (CA 9 1981). *We have no occasion in this case to determine whether an inquiry into voluntariness alone is sufficient to determine the enforceability of release-dismissal agreements.* We also note that it would be helpful to conclude release dismissal agreements under judicial supervision. Although such supervision is not essential to the validity of an otherwise proper agreement, it would help insure that the agreements did not result from prosecutorial misconduct.

Rumery, 480 U.S. at 398 n. 10 (emphasis added).

Moreover, in Justice O'Connor's concurring opinion, the Justice expresses a belief that Part III-B of the plurality opinion presumes the absence of prosecutorial misconduct and that the agreement was entered into in the public interest. *Id.* at 401.

(O'Connor, J., concurring). Portions of the plurality opinion do, in fact, express such a presumption. Specifically, Justice Powell wrote for this plurality:

> [Wle hesitate to elevate more diffused public interest above *Rumery*'s considered decision that he would benefit personally from the agreement.
>
> We also believe the Court of Appeals misapprehended the range of public interest arguably effected by a release-dismissal agreement. The availability of such agreements may threaten important public interests. They may tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges to protect the interest of other officials. But a per se rule of invalidity fails to credit other relevant public interests and improperly assumes prosecutorial misconduct.

Id. at 395.

Understandably, the Courts of Appeals have engaged in conflicting analyses of the guidelines set forth in the Supreme Court's decision in *Rumery*. This may be the inevitable but unfortunate result of the mixed plurality opinions. For instance, in *Woods v. Rhodes*, 994 F.2d 494 (8th Cir. 1993), the Eighth Circuit's analysis of a release-dismissal agreement was based on the three separate criteria it felt were approved in *Rumery* (voluntariness, prosecutorial misconduct and public interest). The court then conceded, however, that the most important general concern bearing on the enforceability of the Release was whether the release was made knowingly and voluntarily. *Id.* at 502. In *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989), the Fifth Circuit stated its belief that *Rumery* requires an analysis based on the same three criteria, but this Court gave equal weight to the three criteria. Finally, in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), the Ninth Circuit stated that the *Rumery* analysis required the examination of only two elements, voluntariness and public interest. *Lynch*, 880 F.2d at 1126.

The court below rested its holding that mere voluntariness is not enough to support the enforcement of a release-dismissal agreement on the *Woods, Berry* and *Lynch* cases. These three cases not only conflict with the majority opinion in *Rumery*, but they also conflict with each other in their interpretation of the various opinions in *Rumery*. Moreover, *Woods, Berry* and *Lynch* are actually distinguishable from the case at bar in that the release-dismissal agreements involved in those cases were entered into without judicial supervision — a consideration which the majority and the plurality opinions in *Rumery* agree is a substantial factor bearing on the validity of a release-dismissal agreement.

As the Court of Appeals below admits, the *Rumery* majority left open the question of whether simply showing that the agreement was voluntarily entered into is sufficient to validate it. App. at 6a. Further, the courts in *Woods, Berry* and *Lynch* fail to recognize this fact, but instead, solely rely on the plurality opinions in *Rumery* on which to base their analyses.

Petitioners respectfully suggest that the time has come for this Honorable Court to clarify the circumstances where mere voluntariness is the lone criteria to be considered in deciding whether to enforce release-dismissal agreements. Had the lower court in the present matter made further inquiry into the facts surrounding Cain's decision to sign a release in conjunction with being admitted into the County of Delaware's ARD program, the following factors, vital to this Court's analysis in *Rumery*, would have been apparent:

> (1) From July 5, 1989, (the day after her arrest) until the date that Cain signed the release, she was not in police custody;
>
> (2) From July 5, 1989, until the date that Cain signed the Release she was represented by competent counsel, who had extensive experience in both civil and criminal law;
>
> (3) Although without the benefit of a college education (the relevance of which one may question under these circumstances) Cain had been involved in the criminal process as a defendant on at least three prior occasions, one of which had resulted in her placement in the Delaware County ARD program;
>
> (4) Several months prior to signing the Release, Cain knew of the requirement of a release as a condition to acceptance into the ARD program and had indicated a desire to sign such a release during that period of time; and
>
> (5) During a judicially supervised colloquy of record before the Honorable Judge Rita Prescott in the Delaware County Court of Common Pleas, the Court was advised that Cain had released the police of all civil liability.

(App. at 674).

In the instant case, this Court should grant certiorari to resolve the conflicts among the Circuits and between the Circuits and this Court's analysis in *Rumery*. This Court should address, as the majority in *Rumery* left open, the issue of whether simply showing that a release-dismissal agreement was entered into voluntarily is sufficient to validate it, and even more specifically, whether such an agreement entered into under judicial supervision, as the present agreement was, is valid by merely showing that the agreement is voluntary. Finally, this Court should grant certiorari to address an issue of first impression. This issue is, whether the principles of *Rumery* should govern release agreements, not unlike the present agreement, which are equivalent to plea bargains.

CONCLUSION

Based upon the foregoing, Petitioners pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM F. HOLSTEN, II
JEFFREY P. HOYLE
Attorneys for Petitioners

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED OCTOBER 18, 1993

Charles CAIN, Executor of the Estate of Diane Cain and Charles Cain in his own right, Appellants

v.

DARBY BOROUGH; Darby Borough Police Department; Robert Boyden; John Chappelle; Cory Kramer; John Doe; Yeadon Borough; Yeadon Borough Police Department; Robert Frazier, Sergeant; John Doe; Colwyn Borough; Colwyn Borough Police Department; John Doe; Arthur Raffaele; Salvatore Nusaforo, Appellees.

No. 91-1897.

United States Court of Appeals,
Third Circuit.

Argued May 1, 1992.

Reargued In Banc May 11, 1993.

Decided Oct. 18, 1993.

Edward J. Devine (argued), Robert J. Casey, Mylotte, David & Fitzpatrick, Philadelphia, PA, for appellants.

Jeffrey P. Hoyle (argued), William F. Holsten, II, Holsten & White, Media, PA, for appellees.

Eric B. Henson (argued), Ellen M. Briggs, Hoyle, Morris & Kerr, Stefan Presser, ACLU of Pennsylvania, David Rudovsky, Kairys & Rudovsky, Philadelphia, PA, for amicus curiae American

Civ. Liberties Union of Pennsylvania.

William H. Ryan, Jr., Dist. Atty., Dennis C. McAndrews, Deputy Dist. Atty. (argued), Media, PA, for amicus curiae Office of Dist. Atty., Delaware County, PA.

Argued May 1, 1992.

Before: BECKER, NYGAARD and HIGGINBOTHAM*, Circuit Judges.

Reargued *In Banc* May 11, 1993.

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

The police arrested Diane Cain and charged her with several violations of the Pennsylvania Criminal Code of Crimes and Offenses resulting from her disorderly and assaultive behavior. Before trial, she petitioned to be placed in a program known as Accelerated Rehabilitative Disposition. Under the ARD program, a prosecutor can move the court to place a defendant on probation without trial. If ARD is approved by the court and the defendant satisfactorily completes the probationary period, his or her charges

---

*** Judge Higginbotham was present when this case was decided by the panel, but retired before the case was reheard *in banc*.**

are dismissed. Under a policy of the Delaware County District Attorney's Office, however, if the police may face civil liability, the District Attorney will not approve ARD unless the petitioner first executes a release-dismissal agreement. Cain, in compliance, executed such an agreement and released all civil rights claims against the police officers who arrested her. Nevertheless, she later sued three municipalities in Delaware County, Pennsylvania, their respective police departments, and a number of individual police officers under 42 U.S.C. § 1983. The gravamen of her complaint was that the police officers used excessive force to arrest her.

The defendants all moved for summary judgment, contending that the release-dismissal agreement provided them an absolute defense. The district court granted the defendants' summary judgment motion and dismissed the complaint. It opined that the release was a complete bar to Cain's action because she had signed the release voluntarily and the release was not adverse to the public interest. The court found no genuine issues of material fact and decided these points as a matter of law. Charles Cain, executor of Diane Cain's estate, appealed and a panel of this Court reversed the summary judgment and remanded the cause for further proceedings.[1] On consideration of a petition for rehearing filed by the defendants, the full Court then voted to vacate the panel opinion and rehear the case *in banc*.

The issue before us is whether the release-dismissal agreement that Diane Cain signed was valid and enforceable. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary. *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir.1990),

---

[1] Diane Cain died in 1991 from causes unrelated to this case.

cert. denied, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991). Because we find that the agreement is unenforceable as a matter of law, we will reverse and remand the cause for the district court to decide the merits of Cain's claims.

I.

The leading case in the law of release-dismissal agreements is *Town of Newton v. Rumery,* 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). Bernard Rumery was charged with witness tampering for threatening harm to the complaining witness in a sexual assault case if she testified against Rumery's friend. Rumery's attorney threatened a civil suit for false arrest against the town unless the state dropped the charges. After negotiating with the state prosecutor, Rumery's attorney drafted a release-dismissal agreement by which Rumery released his claims against the town and the state prosecutor dismissed the charges against Rumery.

Rumery discussed the agreement with his attorney for an hour and considered it for three days before he signed it. The witness tampering charges were dropped, but Rumery sued the town of Newton anyway under 42 U.S.C. § 1983. The town moved for summary judgment arguing that Rumery's suit was barred by the release agreement. The district court granted the motion, but on appeal, the Court of Appeals for the First Circuit held that the release was unenforceable because these agreements were *per se* against public policy.

The Supreme Court reversed, holding that release-dismissal agreements are not *per se* unenforceable. *Rumery,* 480 U.S. at 394, 107 S.Ct. at 1193. It refused to treat section 1983 differently than any other constitutional or statutory right, and concluded that the validity of these agreements is best resolved by reference to traditional common law principles. *Id.* at 391, 107 S.Ct. at 1191 (citing *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984)). Justice Powell, writing for a majority of five, adopted a case-by-case approach, reasoning that an agreement would be unenforceable "if the interests in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* 480 U.S. at 392, 107 S.Ct. at 1191.

The central tension the *Rumery* Court harmonized was between the need, on the one hand, to curb the temptation to "trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights," while on the other hand, to enforce one's "considered decision that he would benefit personally from the agreement" giving up his individual right to sue. *Id.* at 394-95, 107 S.Ct. at 1193 (internal quotation marks omitted). The Court resolved this tension by requiring that release-dismissal agreements be executed voluntarily, free from prosecutorial misconduct and not offensive to the relevant public interest. *Id.* at 398, 107 S.Ct. at 1195. Under this analysis, the concept of prosecutorial misconduct is embedded in a larger inquiry into whether enforcing the release would advance the public interest. In sum, the majority approved the concept if a defendant seeking to enforce a release-dismissal agreement can prove that the agreement was voluntarily executed and not adverse to the public interest.

With respect to the relevant public interests, Justice Powell, writing only for a plurality of four,[2] identified two public interests that could justify a release-dismissal agreement: the interest in protecting officials from the burdens of defending "marginal" or "frivolous" section 1983 claims and the interest in expeditiously resolving minor criminal charges while allocating the scarce resources of the criminal justice system to the prosecution of more serious charges. *Id.* at 395-96, 107 S.Ct. at 1193.

---

[2] Justice O'Connor, who provided the fifth vote for the court's holding that release-dismissal agreements are not *per se* impermissible, did not join this part of Justice Powell's opinion.

II.

A.

Hence, this appeal presents two primary questions: whether Diane Cain's release agreement was voluntary, and if so, whether it meets the public interest test enunciated in *Rumery.* We need not decide the first issue because we will simply assume that Cain voluntarily executed the release. Before we consider *Rumery's* public interest requirement, however, we must determine whether simply showing that the agreement was voluntary is sufficient to validate it. The *Rumery* majority specifically left that question open. *See id.* at 398 n. 10, 107 S.Ct. at 1195 n. 10.

The *Rumery* Court rejected the view that voluntary release-dismissal agreements are *per se* adverse to the public interest. We see no reason to embrace the opposite extreme that voluntary release-dismissal agreements are *per se* beneficial to the public interest. Even though "Congress has confined the decision to bring [section 1983] actions to the injured individuals, not the public at large," *id.* at 395, 107 S.Ct. at 1193, there are nonetheless strong public interests in allowing section 1983 suits and, conversely, strong public interests against release-dismissal agreements that bar colorable section 1983 claims. Litigants wo bring meritorious section 1983 claims advance societal interests because the vindication of their constitutional rights helps provide an important check on public officials and presumably deters a range of official misconduct, such as the use of excessive force alleged here. For this reason we hold that mere voluntariness is not enough to support enforcement of a release-dismissal agreement. The party seeking to enforce the agreement must show that upon balance the public interest favors enforcement.[3]

B.

The Court in *Rumery* recognized that there can be a valid law enforcement interest in preventing the public fisc from being wasted by defending frivolous lawsuits. By implication, such an interest may be sufficient to justify judicial enforcement of a release-dismissal agreement. Although it is the prosecutor's duty to represent the public generally rather than protect public officials who may be defendants in civil rights actions, there is nonetheless a public interest in governmental thrift and providence. Accordingly, a release-dismissal agreement that averts litigation over marginal or frivolous section 1983 claims may advance the public interest. For this reason, if the time and expense of defending such a suit actually motivated a prosecutor's decision to drop criminal charges in exchange for the defendant's release of civil rights claims, then the prosecutor is presumably making the decision, not out of concern for the private interests of government officials, but rather out of concern for the public interest in preserving governmental resources.

---

[3] Other courts of appeals have similarly required that defendants demonstrate a public interest justification for release-dismissal agreement in addition to voluntariness. *See, e.g. Woods v. Rhodes*, 994 F.2d 494 (8th Cir.1993): *Berry v. Peterson*, 887 F.2d 635, 641 (5th Cir.1989): *Lynch v. Alhambra*, 880 F.2d 1122, 1128 (9th Cir.1989). We have found no court of appeals decision that has held to the contrary.

The standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached. Additionally, the public interest reason proffered by the prosecutor must be the prosecutor's *actual reason* for seeking the release. In *Rumery,* the Supreme Court enforced the release agreement because Rumery voluntarily signed the agreement and no improper motivation tainted the prosecutor's decision to seek the release. In fact, the parties agreed that the prosecutor sought the release because he wanted to protect a witness from the trauma of testifying in two trials. This motivation constituted "an independent, legitimate reason . . . directly related to his prosecutorial responsibilities," and advanced a legitimate prosecutorial function. *Id.*, 480 U.S. at 398, 107 S.Ct. at 1194. Any alternative to the "actual reason" requirement creates the real danger that actions taken pursuant to an improper motive, such as to protect public officials from a meritorious civil rights lawsuit, may be legally excused because a court later finds that some "benefit" has been incidentally achieved. Thus, the issue is not what the prosecutor might or could have thought; it is what actually motivated him or her in seeking a particular release.

C.

The Delaware County District Attorney's Office has a blanket policy of requiring a release from every ARD petitioner who might have a civil rights claim against government officials. This policy precludes even an otherwise qualified applicant from the rehabilitative benefits of the program unless that person executes a release-dismissal agreement. Assistant District Attorney Wayne Punshon described the policy as follows:

> Insofar as ARD is concerned, . . . the ARD Program is to bypass the litigation that is

> involved in a criminal prosecution; . . . to proceed directly to what would likely be the outcome of the case in order to ease the burden of caseloads on the Courts.
>
> In conjunction with that it's in the interest of the prosecutor's office and the police to avoid the needless litigation, the ofttimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion. That is why a release is required [in] situations where it may be reasonably anticipated that litigation will subsequently arise after the individual is . . . given ARD . . . .
>
> In this particular kind of a case, what we are dealing with here is a domestic situation where, undoubtedly, emotions run high. We are dealing with in—I don't know what percent—but, in an extraordinary high percent of cases where the people, the complainants or the defendants are intoxicated. And, they may very well remember things differently—*I'm not saying that in this particular case,* but I'm talking about this *class of cases.* so, the idea is that even though they may very well believe that the facts were such and such, we are dealing with a District Justice's prima facie determination that a crime was committed by the defendant.

App. 268-69 (emphasis added).

In effect, the District Attorney's reason for seeking *this* release stems from his belief that since Diane Cain's case arose from a domestic dispute, and thus fell within the *class of cases* where the number of frivolous cases reach "an extraordinary high percent," the public interest was served by avoiding a civil rights lawsuit. The District Attorney did not individually assess the merits of Diane Cain's civil rights claims, but simply required that she agree to release them before he would move the court to admit her into ARD.[4] so, as to "this class of cases," the District Attorney's policy is quite simple: no release, no ARD.

The public policy implications must be examined on a case-by-case basis to determine whether the public interest in enforcing the agreement outweighs any harm. *Rumery,* 480 U.S. at 392, 107 S.Ct. at 1191 (citing Restatement (Second) of Contracts § 178(1) (1981)). To determine the relevant public interest here, we must consider the purpose of ARD, the nature of the prosecutorial duty to administer it, and how Delaware County's blanket policy affects both the administration of ARD and the prosecutorial function. ARD is a rehabilitation program that allows prosecutors to avert a trial and defendants to ultimately earn a dismissal of criminal charges by satisfactorily completing a probationary program. The purpose of ARD is primarily to rehabilitate offenders and secondarily to promptly dispose of minor criminal charges. Pa.Crim.R. 160-86 & Committee Introduction. It was intended for first time offenders who are charged with minor crimes and who appear receptive to treatment and rehabilitation. ARD encourages first time offenders to reform by offering them a clean record if they successfully complete the program, rather than impose a traditional and historically non-productive period of imprisonment.

---

[4] Assistant District Attorney Punshon testified: "That's—had I not been given the release, I would not have made the motion. It's not a condition of the ARD Program that while she entered it or as she entered it that she sign the release. It's a condition of my making the motion." App. 308-09.

District attorneys administer ARD, and the decision to request ARD of the court rests in their sound discretion. *Commonwealth v. Armstrong*, 495 Pa. 506, 434 A.2d 1205, 1208 (1981). While admission into ARD is not a right, *Commonwealth v. Paul*, 383 Pa.Super. 486, 557 A.2d 357, 358 (1989), prosecutors do not have naked power to grant or deny the program at whim. *Commonwealth v. Lutz*, 508 Pa. 297, 495 A.2d 928, 935 (1985). They must administer ARD in a maner that is consistent with its goals. Prosecutors abuse their discretion if they employ criteria unrelated to these two goals, that is, "some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation." 495 A.2d at 935.

The decision to recommend ARD is directly related to the prosecutorial function. Given ARD's goals, some legitimate considerations include the defendant's potential for rehabilitation, criminal record, the nature of the crime charged, and whether that person presents a danger in society. It cannot be disputed that the District Attorney's blanket policy is wholly and patently unrelated to the goals of ARD. It is both under- and over-inclusive because it may allow unqualified criminal defendants to be admitted into ARD if they sign releases and at the same time exclude the otherwise qualified because they did not. The policy does not seek to rehabilitate those who are deemed capable of it, nor does it seek to protect society from those who are not.

The District Attorney rationalizes his policy on the ground that he and the police have an interest in avoiding "the needless litigation, the ofttimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion." When asked at oral argument whether this policy would also preclude meritorious claims, counsel for the District Attorney conceded that it would. The policy does not distinguish between frivolous and meritorious litigation; it indiscriminately curtails both. While ARD was designed in part to promptly dispose of minor *criminal* charges, thus eliminating the need for costly and time-consuming criminal trials, it was never intended to dispose of *civil rights* claims.

The District Attorney failed to apply any of the relevant factors to Diane Cain's case. In fact, he conceded that he did not even investigate her eligibility for the ARD program. Had he done so, he would have found that Cain was not a first time offender; that she had been arrested on three occasions for retail theft; that she had previously participated in ARD; and that she allegedly had been involved in several incidents in which she stabbed her husband with a knife. The District Attorney testified that he erred and had he been aware of Cain's criminal record "she would not have received [ARD]."

Rumery requires the District Attorney to identify a legitimate public policy supporting the decision to dismiss criminal charges in return for a defendant's agreement to release a civil rights claim. We recognize that protecting public officials from civil suits may in some cases provide a valid public interest and justify the enforcement of a release-dismissal agreement. Nonetheless, we believe that under *Rumery* there must first be a case-specific showing that the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason. There was no such showing here. Not only did the Delaware County District

Attorney's Office fail to engage in any individualized analysis of Cain's civil rights claims before obtaining a release-dismissal agreement from her, the defendants also have made no attempt to establish that Cain's section 1983 suit was marginal or frivolous or that the release-dismissal agreement advanced any other public interest. Rather, the defendants have chosen simply to rely on the District Attorney's Office *blanket policy* of requiring release-dismissal agreements for ARD candidates as proof that *this* release-dismissal agreement advanced the public interest. This, as we have said, is insufficient.

III.

Simply stated, this record will not support a determination that the public interest requirement of *Rumery* has been satisfied. As we have explained, because the District Attorney made no case-specific showing that the public interest was served by obtaining the release, the district court erred by determining that as a matter of law the public interest requirement was satisfied. We will reverse the grant of summary judgment for the defendants and remand the cause for the district court to decide the merits of Cain's claims.

GREENBERG, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion and in particular with its central point that the blanket practice of requiring a release as a condition for admission into the ARD program is invalid. But I dissent from its disposition, as I believe that the case should be remanded to give the appellees the opportunity to establish that the release-dismissal agreement was justified either on the ground that Ms. Cain's claim was frivolous, regardless of the state of the district attorney's knowledge when the agreement was made, or on some other ground predicated upon other factors demonstrating that enforcement of the agreement would further a valid public interest.

I believe that ordinary contract principles and simple fairness require the remand I envision. The appellants, though challenging the validity of the agreement, cannot deny that Ms. Cain received from it the benefit of being accepted into the ARD program, which was the outcome she sought of the criminal proceeding. Accordingly, the appellants are in a position similar to that of parties to a contract who, if they seek its rescission, usually are required to return the benefits they received from the agreement. This principle is hardly new, for as long ago as 1886 the Court of Errors and Appeals of New Jersey was able to say that "[i]t is a well-settled principle of law and equity that a party cannot rescind a contract by his own will, and at the same time keep possession of the consideration, in whole or in part, which he has received under it." *Doughten v. Camden Bldg. & Loan Ass'n,* 7 A. 479, 480 (1886). But the appellants cannot offer to return the benefit Ms. Cain received from the contract because she is dead and the prosecution cannot be reinstituted. In these circumstances, the appellees should be permitted to justify the release-dismissal agreement on grounds alternative to the blanket policy.

In reaching this conclusion, I have not overlooked the fact that if the appellees now establish that the agreement was valid, they will be relying on a justification identified after Ms. Cain and the district attorney agreed to it. But there is nothing unusual in permitting an after-the-fact inquiry into whether a public official's actions, which were in fact based on an improper predicate, could have been justified for other reasons and therefore validated. *See Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377

(1984); *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In *Nix v. Williams* and *Mt. Health v. Doyle* this form of inquiry was undertaken even though the person challenging the public official's conduct had not asked the official to engage in that conduct. Here, the after-the-fact inquiry is even more appropriate because Ms. Cain initiated the proceedings which led to the release-dismissal agreement. Indeed, in my view, the *Nix v. Williams* and *Mt. Healthy v. Doyle* principle in itself requires the remand I would order.

The majority had no need to consider whether Ms. Cain entered into the transaction voluntarily. My position requires me to face this issue, although in consideration of the procedural posture of the case, I see no need to write on this issue at lenghth.[1] I simply note that I would hold that on the record here there are no disputed facts which could permit a holding that the agreement was not voluntary. The record shows that Ms. Cain entered into the release-dismissal agreement without coercion as the product of a deliberate and informed decision. Furthermore, her attorney gave her a detailed explanation that if she signed the agreement she would be prohibited forever from suing the officers named in it. Indeed, her attorney went so far as to read the release to her out loud. It also is undisputed that Ms. Cain was an intelligent woman, fluent in English and experienced in criminal matters, and that she had months to consider whether to sign a release.

Circuit Judge ALITO joins in this opinion.

---

[1] Of course, the mere fact that unless Ms. Cain signed the release she faced prosecution did not render the agreement involuntary. *Town of Newton v. Rumery,* 480 U.S. 386, 393, 107 S.Ct. 1187, 1192, 94 L.Ed.2d 405 (1989).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 5, 1993

Filed March 5, 1993
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1897

CHARLES CAIN, Executor of the
Estate of Diane Cain and CHARLES CAIN
in his own right,

Appellants

v.

DARBY BOROUGH; DARBY BOROUGH POLICE
DEPARTMENT; ROBERT BOYDEN; JOHN
CHAPPELLE; CORY KRAMER; JOHN DOE;
YEADON BOROUGH; YEADON BOROUGH
POLICE DEPARTMENT; ROBERT FRAZIER,
SERGEANT; JOHN DOE; COLWYN BOROUGH;
COLWYN BOROUGH POLICE DEPARTMENT;
JOHN DOE; ARTHUR RAFFAELE; SALVATORE
NUSAFORO,

Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-1583)

Argued May 1, 1992

Before: BECKER, NYGAARD and
HIGGINBOTHAM, *Circuit Judges*.

Appendix B

(Filed March 5, 1993)

ROBERT J. CASEY, ESQ. (ARGUED)
Mylotte, David & Fitzpatrick
1800 John F. Kennedy Boulevard
7th Floor
Philadelphia, PA 19103

Counsel for Appellants

JEFFREY P. HOYLE, ESQ. (ARGUED)
Holsten & White
One Olive Street
Media, PA 19063

Counsel for Appellees

OPINION OF THE COURT

Per Curiam.

A release-dismissal agreement is an agreement between a criminal defendant and the prosecution. Under the agreement, the prosecutor either dismisses the charges against the defendant or places the defendant on probation and in exchange the defendant releases any claims against the police or the municipality for any harm caused by, or during, the defendant's arrest.

Diane Cain entered into a release-dismissal agreement with the District Attorney's office of Delaware County, Pennsylvania. Cain was placed on probation and, in exchange, released any claims she had against three municipalities in Delaware County, their respective police departments, and individual police officers, for harm caused her during her arrest. The question before us is whether the release-dismissal agreement is a bar to a § 1983 action brought by Diane Cain against the three municipalities, their police departments, and the individual police officers involved in her arrest. The district court held that it was, granting summary judgment in favor of the defendants. We reverse, and remand for further proceedings.

I.

On July 4, 1989, Diane Cain, a forty-five year old woman terminally ill from cancer, was arrested by police officers from the Darby Borough, Yeadon Borough and Colwyn Borough police departments in Delaware County, Pennsylvania, and was charged with resisting arrest, disorderly conduct, simple assault and aggravated assault on a police officer.

On that day a friend of Diane Cain's daughter, Joe Wettlaufer, allegedly stole money belonging to her. Diane Cain called her husband Charles, from whom she was separated, and he arrived at her home shortly thereafter. He told her that he had a gun. Ms. Cain telephoned the police and reported that her husband was armed with a gun and was chasing Joe Wettlaufer. In response, officers from the Darby, Yeadon and Colwyn Borough Police Departments came and arrested Charles Cain. Ms. Cain drove her car from her house and saw her husband's car in a nearby parking lot. A number of police were there. When she asked where her husband was and the officers did not respond, she cursed at them. She was told if she did not leave, she would be arrested, and she was.

During her arrest, Cain again cursed at police officers and bit one of them in the arm. The police, in turn, beat her with a nightstick and burned her with a stun gun. The next day Cain went to the hospital and was examined by a physician who recorded her injuries. The physician's report was sent to the police and included in the file submitted to the District Attorney's office. During the week following her arrest, Cain visited Robert Smythe, the chief of police of Darby Borough. Cain had a personal friendship with Smythe and other senior officers of the Darby Borough Police force. According to Smythe, Cain confessed that she was wrong in causing the incident that led to her arrest and explained that she "had not been herself" at the time because of the cancer medication she was taking. Apparently, Cain also sought Smythe's advice on how to get the charges against her dropped. Smythe told Cain that she might be eligible for the Accelerated Rehabilitation Disposition (ARD) program but that first she would have to release the officers for any liability arising out of her arrest.

Under the Delaware County ARD program, a defendant is placed on probation by the court on motion of the prosecutor. Upon satisfactory completion of the probationary period, the charges against the individual are dismissed. One purpose of the ARD program is to bypass litigation in certain non-felony criminal prosecutions to ease the burden of case loads on the courts. The unwritten but explicit policy of Delaware County is to require a civil liability release from ARD defendants in all cases where the District Attorney believes the police may face civil liability for them. The stated purpose of the release is to avoid presumably needless litigation and frivolous lawsuits. It is the policy of Delaware County to deny admission to otherwise qualified ARD defendants if they refuse to sign a release.

Usually, between eighteen to thirty defendants are admitted into ARD in one collective session in court. Before moving the court for admitting the defendants into the program, the district attorney obtains from them the signed civil release form, and reads a ten minute explanation of the ARD program to all the defendants. Then the defendants are called individually and asked whether they have heard and understood the explanation. Finally, the district attorney makes a motion to the court and the defendant is admitted into the program.

Following her conversation with Chief Smythe, Diane Cain hired an attorney named Guy Smith. Smith had more than twenty years experience practicing criminal law. Cain wanted the charges against her resolved as quickly as possible. She knew that she was dying and time had become precious to her. During one of their early consultations, Smith informed Cain about the ARD program and advised her that if she wanted to be placed on ARD she probably would have to sign an agreement releasing the police from civil liability.

On September 29, 1989, the District Attorney's Office notified Smith by letter that Cain would be considered for the ARD program. In her application for ARD Cain had represented that she had "never been arrested or charged with any criminal or vehicular offense" except for the July 4, 1989 charges. In fact, Cain had been arrested on three previous occasions for retail theft, and had been placed on ARD for her last arrest. Apparently, the District Attorney's office would not have recommended Cain for ARD on the July 4 charges had it known that she had previously been placed on ARD.

On October 18, 1989, Cain attended her ARD hearing in the Delaware County Court of Common Pleas. Smith was busy that day and asked Donna Zaccaria, an associate at his firm, to represent Cain at the hearing. Smith did not tell Zaccaria that Cain had agreed to sign a release in exchange for being placed in the ARD program. Zaccaria had graduated from law school in August 1987 and had never tried a criminal case. She had, however, handled about a dozen ARD hearings for Smith's firm.

Approximately twenty minutes before Cain's ARD hearing, the prosecutor and the Chief of the ARD Division, Wayne Punshon, handed Zaccaria a pre-printed civil release prepared by the District Attorney's office. Zaccaria went over the release with Cain in the courtroom. The release stated:

> I, the undersigned Defendant, for the sole consideration of one Dollar ($1.00), receipt of which is acknowledged, and for being accepted into the ARD program in the above-captioned matter, do hereby remise, release, and forever discharge Officer Cory Kramer, Officer Robert Boyden and Officer John Chapelle as well as the Darby Boro Police Dept., their heirs, executors and administrators (or its successors and assigns), of and from any and all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claim and demands

> whatsoever in law or equity, which have resulted or may develop in the future in connection with he (sic) incident which occurred and led to the filing of charges in the above captioned matter.
>
> IN WITNESS WHEREOF, I have here unto set my hand and seal this 18 day of October 1989.

Diane Cain's purported signature appeared below, and underneath her signature, the release stated:

> I, the undersigned Attorney, hereby aver that I represent the above Defendant. I further aver that I have reviewed this Release with my client, that he (sic) has signed it in my presence, and that I believe he (sic) fully understands its contents.

Under this paragraph, Zaccaria signed the release: "Donna Zaccaria for G. Guy Smith." The prosecutor then made a motion to have Cain admitted into the program. The court asked her if she understood all the terms and conditions of the program. Cain answered that she did. The court accepted her into the program and sentenced her to three months probation.

Before requiring a waiver from Diane Cain, the district attorney did not fully investigate whether Diane Cain had a complaint against the police. Instead, Wayne Punshon recalls talking only to the Chief of Police and to the officers involved in Diane Cain's arrest. At the time of her admission into ARD, Diane Cain had not filed a complaint against the police. However, Diane Cain had discussed her injuries with Smythe, the Chief of Police, and apparently, the physician's report noting the extent of the injuries suffered by Diane Cain during her arrest was included in the file submitted to the District Attorney's office.

During the motion for Diane Cain's admission into the program, the District Attorney did not ask her whether she had signed the release in exchange for being placed on ARD, whether she understood the terms of the release or whether she had signed the release voluntarily. In fact, when Mr. Punshon was asked directly about whether Diane Cain had signed the release voluntarily and knowingly, he answered that he had no knowledge whether she had signed the release knowingly and voluntarily. The district attorney kept the one and only copy of the release. No copy was filed in court, and no copy was given to Diane Cain or her attorney.

In 1991, Diane Cain and her husband, Charles Cain filed two separate suits alleging state tort claims in the Delaware County Court of Common Pleas; one against the Darby Borough Police Department and its officers, the other against the Yeadon Borough Police Department and its officers. On March 13, 1991, Diane Cain and Charles Cain commenced this suit under 42 U.S.C. § 1983 in the district court for the Eastern District of Pennsylvania. The Cains named as defendants the boroughs of Darby, Yeadon, and Colwyn, their respective police departments and several individual police officers who were involved in her arrest.

Because her cancer was progressing, Diane Cain gave a video deposition on March 13, 1991. On April 19, 1991, she died of cancer. Her husband continued the suit in his own right and as executor of her estate. Up until Diane Cain's death, none of the parties was aware that she had signed a release of civil liability. Thus, during Diane Cain's videotape deposition she was never questioned on the issue. In July 1991, after Diane Cain's death, the release surfaced as a result of a discovery request from Cain's counsel to the District Attorney's office. Defendants immediately moved for summary judgment on the strength of the release. Charles Cain opposed the motion by submitting among other documents, two affidavits: one from Guy Smith, stating that he never advised Diane Cain to release the police from civil liability in exchange for her acceptance into the ARD program, and the other from Donna Zaccaria, stating that she had "no independent recollection" of Mrs. Cain releasing any claims she might have for personal injury due to civil rights violations committed upon her by various police officers.

In September 1991 the district court held a four-day hearing on the summary judgment motion. Two issues were presented to the court: first, whether the release-dismissal agreement was enforceable; and second, if enforceable, whether the release also covered individual officers not specifically named in it. On September 29, 1991, the court granted defendants' motion. The court held that the release was a complete bar to the Cains' § 1983 action because Diane Cain signed the release voluntarily and because the release was not adverse to the public interest. The court also held that the release covered all police officers who were involved in Diane Cain's arrest, even those who were not specifically named in it.

Charles Cain, in his own right and as executor of the estate of Diane Cain, now appeals the district court's order of summary judgment. Cain raises the same two grounds on appeal as were before the district court on the motion for summary judgment. Because of the uncertain result of the remand ordered herein, we refrain from reaching the issue of whether the release covers individual officers not specifically named in it.

The two state court actions have been stayed pending the outcome of this appeal. The American Civil Liberties Union of Pennsylvania has filed an Amicus Curiae Brief in support of appellants, Charles and Diane Cain.

II.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the district court's grant of summary judgment is plenary. *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, *Powell Duffryn Terminals v. Public Interest Research Group, Inc.*, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991).

The leading case in the law of release-dismissal agreements is *Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). In *Rumery*, Bernard Rumery, a businessman in Newton, New Hampshire, was arrested on the felony charge of witness tampering. The police alleged that Rumery had called Mary Deary, the complaining witness in a sexual assault case against a friend of Rumery, and threatened to harm Deary physically if she testified against his friend. After Rumery was arrested, his attorney contacted the state prosecutor and warned that Rumery would file a civil suit for false arrest against the town unless the police dropped the criminal charges against him. After further negotiation with the state prosecutor, Rumery's attorney drafted a release-dismissal agreement under which Rumery would release any claims he might have against the town if the state prosecutor dismissed all criminal charges against Rumery. Rumery discussed the agreement with his attorney for about one hour and, after considering it for three days, he signed it. The witness tampering charges were subsequently dropped. Ten months later, Rumery sued the town for violations of his civil rights under 42 USC § 1983. The town moved for summary judgment, arguing that the suit was barred by the release agreement. The First Circuit ruled that the release was unenforceable because it was *per se* against public policy.

The Supreme Court reversed and held that a release-dismissal agreement is not *per se* unenforceable. *Rumery*, 480 U.S. at 394. Instead, Justice Powell, writing for a majority of five, adopted a case-by-case approach and reasoned that the agreement would be unenforceable "if the interests in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392. Thus, the court concluded that a release-dismissal agreement is enforceable if it is signed voluntarily, if it does not involve prosecutorial misconduct, and if it does not adversely affect the relevant public interests. *Id.* at 398.

As to the requirement that the release be voluntary, the court reasoned that Rumery had made a voluntary, deliberate and informed decision in signing the release. *Id.* at 394. The court's reasoning was based on several factors: Rumery was a "sophisticated businessman," *id.*; "he was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement," *id.*; and "he considered the agreement for three days before signing it." *Id.*

As to the requirement that the prosecution not engage in overreaching, the court concluded that "the prosecutor had an independent legitimate reason to make the agreement directly related to his prosecutorial responsibilities" because the prosecutor believed that Mary Deary, the key witness in the sexual assault case, would not have testified in that case had she been forced to testify against Rumery in the witness tampering case. *Id.*

Finally, as to the requirement that the agreement not be adverse to the relevant public interest, Justice Powell, this time writing only for a plurality of four,[1] identified the "relevant" public interests as follows: the public interests in protecting officials from the burdens of defending "marginal" and "frivolous" § 1983 claims, and in resolving minor criminal charges and allocating scarce resources of the criminal justice system to the prosecution of more serious charges. *Id.* at 395-96.

Justice O'Connor concurred in part and in the judgment. However, Justice O'Connor wrote separately, warning that:

> [p]ermitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil rights complaints. The risk of a criminal trial can easily intimidate

---

[1] Justice O'Connor, who provided the fifth vote holding that release-dismissal agreements were not *per se* impermissible, did not join this part of Justice Powell's opinion.

> even an innocent person whose civil and constitutional rights have been violated. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

Id. at 400.

Thus, to clarify the court's holding and to safeguard against what she perceived as a serious potential for prosecutorial abuse, Justice O'Connor emphasized that the burden of proving that an agreement is voluntary and not the product of an abuse of the criminal process rests on the party relying on the agreement. *Id.* at 400-401. According to Justice O'Connor, voluntariness may be proved by several factors: the knowledge and experience of the defendant; the circumstances of the execution of the release; whether the plaintiff in the 1983 suit was counseled before signing the release; and the nature of the criminal charges. *Id.* at 402. Moreover, according to Justice O'Connor, the absence of prosecutorial overreaching may be proved by: the existence of a legitimate criminal justice objective for obtaining the release; and the extent to which the release was obtained under judicial supervision. *Id.*

III.

A.

The practice of release-dismissal agreements has historically been regarded as suspicious at best, and odious at worst. *See*, Kreimer, *Releases, Redress and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in*

Exchange for Dismissal of Criminal Charges, 136 U.Pa.L.Rev. 851 (1988). Before *Rumery*, many courts imposed a *per se* ban on such agreements because they tended to be inherently coercive, tolerant of police misconduct, inconsistent with the prosecutorial role, and suppressive to the airing of civil rights complaints.[2]

---

[2] *Sexton v. Ryan*, 804 F.2d 26, 27 (2d Cir. 1986) (finding that release-dismissal agreements are "inherently suspect"); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984) ("When private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action . . . qualifies as a deprivation of due process); *Brewer v. Blackwell*, 692 F.2d 387, 399 (5th Cir. 1982) (requiring detainees to sign a hold-harmless agreement before release is a deprivation of liberty); *Boyd v. Adams*, 513 F.2d 83, 88, 89 (7th Cir. 1975) (stating that release-dismissal agreements are inherently coercive and against public policy); *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir.), (likening release-dismissal agreement to extortion of property from defendant), *cert. denied*, 400 U.S. 852 (1970); *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) ("Courts may not become enforcers of these odious agreements"); *Hall v. Ochs*, 623 F.Supp. 367 370 (D. Mass. 1985) (holding agreement invalid under both state and federal constitutional law because parties lacked equal bargaining power), *aff'd in part and rev'd in part*, 817 F.2d 920 (1st Cir. 1987); *Horne v. Pane*, 514 F.Supp. 551, 552 (S.D.N.Y. 1981) (a defendant offered a release-dismissal agreement cannot as a matter of law make an uncoerced choice); *Cowles v. Brownell*, 540 N.Y.S.2d 973, 975 (1989) (absent compelling reasons for their enforcement, "release-dismissal agreements present an unacceptable risk of impairing the integrity of the criminal justice process); *Foley v. Lowell Div. of Dist. Court Dep't*, 398 Mass. 800, 804-805, 501 N.E.2d 1151, 1153-54 (1986) (practice of dismissing complaints on conditions that releases be executed is inappropriate use of an extraneous factor in the criminal process); *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 212 n.3a, 389 A.2d 874, 879 n.3a (1978); *Gray v. Galesburg*, 71 Mich. App. 161, 166-67, 247 N.W.2d 338, 341

While the Supreme Court in *Rumery* did away with the *per se* ban, it was wary of the dangers posed by release-dismissal agreements. According to the majority opinion: "in some cases these agreements infringe upon important interests of the criminal defendant and of society as a whole", *Rumery*, 480 U.S. at 392; they "may not be the product of an informed and voluntary decision," *id.* at 393, and "they may tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials," *id.* at 395.

Yet, in spite of these misgivings, the majority rejected a *per se* ban because in certain instances release-dismissal agreements can further "significant public interests." *Id.* at 392. According to the court, the public interests served by release-dismissal agreements are analogous to those served by plea bargains:

> [W]hen the State enters into a plea bargain with a criminal defendant, it receives immediate and tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources. Also the defendant's agreement to plead to some crime tends to ensure some satisfaction of the public interest in the prosecution of crime and confirms that the

---

(1976) (finding release-dismissal agreements "repugnant to public policy" because they undermine the prosecutorial function and are coercive); *Kurlander v. Davis*, 103 Misc.2d 919, 926, 427 N.Y.S.2d 376, 380 (Sup.Ct. 1980) ("Representation of the civil interests of the police plays no part in the performance of the [prosecutor's] duties. . . . Extraction of this waiver clearly violates the protections guaranteed by the Bill of Rights . . . .").

> prosecutor's charges have a basis in fact. *The benefits the State may realize in particular cases from release-dismissal agreements may not be as tangible, but they are not insignificant.*

Id. at 393 n.3 (emphasis added) (citation omitted).

All in all, *Rumery* can by no means be read as an endorsement of release-dismissal agreements. The majority opinion approved the use of such agreements only where the party relying on the agreement proved that it was entered into voluntarily, that it was related to the prosecutorial function, and that it was not adverse to the public interest.

That the agreement be signed voluntarily means not only that the criminal defendant not be coerced into signing the agreement, but also that the agreement be the product of a deliberate and informed decision. Indeed, the majority in *Rumery* described the process by which the criminal defendant had signed the agreement as "voluntary, deliberate and informed." *Id.* at 391, 393. Specifically, the criminal defendant was an experienced businessman. His own attorney drafted the agreement after consultation with the prosecution. He discussed the agreement with his attorney and considered it for three days before signing it.

The requirement that the agreement be related to the prosecutorial function is satisfied when the prosecutor has "an independent reason to make [the] agreement directly related to his prosecutorial responsibilities." *Id.* at 398. For example, in *Rumery*, the prosecutor believed that Mary Deary, the key witness in the sexual assault case, would not have testified in that case had she been forced to testify against Rumery in the witness tampering case. *Id.* We read *Rumery* to mean that, while the "not insignificant" public interests served by release-dismissal agreements may work against a *per se* ban, these agreements should only be enforced where the party relying on the agreement meets the burden of showing that the agreement was the product of a voluntary, deliberate and informed decision on the part of the criminal defendant, that the prosecutor did not overreach, and had an independent legitimate reason to enter into the agreement directly related to prosecutorial responsibilities.

Here, the boroughs of Darby, Yeadon and Colwyn Boroughs, their respective police departments and the individual police officers involved in Diane Cain's arrest have thus far failed to show that Cain entered into the release-dismissal agreements voluntarily and that the District Attorney's Office of Delaware County had an independent legitimate reason to enter into the agreement directly related to its prosecutorial responsibilities.

B.

VOLUNTARY, DELIBERATE AND INFORMED

In *Rumery*, the Supreme Court stated that the release-dismissal agreement was the product of a "voluntary, deliberate and informed" decision. *Rumery*, 480 U.S. at 391, 393. The majority also emphasized that Rumery's decision to sign the release-dismissal agreement reflected "a highly rational judgment." *Rumery*, 480 U.S. at 394. In addition, the plurality reiterated that Rumery made "a considered decision" to sign the agreement. *Id.* at 395.

Here, the district court concluded that Diane Cain had voluntarily signed the waiver because she was not coerced by the prosecution or by the police. In so holding, the district court relied on *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989). In that case, the Court of Appeals for the Fifth Circuit, applying *Rumery*, found that a criminal defendant had signed a release-dismissal agreement voluntarily because the defendant was not coerced by the prosecution. *Berry*, 887 F.2d at 639. With all due respect to our learned colleagues on the Fifth Circuit, we submit that such a reading is a significant expansion of the careful holding of *Rumery*. The Supreme Court did not hold in *Rumery* that a criminal defendant will be deemed to have signed a release-dismissal agreement voluntarily merely if the defendant was not coerced into signing the agreement. Rather, the Court held that the release-dismissal agreement must be the product of a voluntary, deliberate and informed decision on the part of the criminal defendant.

Taking into consideration the circumstances under which Cain signed the release, and keeping in mind that this is a motion for summary judgment, it cannot be said, as a matter of law, that the agreement was the product of an informed and deliberate decision. Guy Smith, Diane Cain's attorney, signed an affidavit stating that he never gave her any advice on signing a release other than making a brief remark that the police were unlikely to allow her into ARD without obtaining a release from her. Cain testified in her deposition that she wanted to get into the ARD program because she was dying, and time was precious to her. Twenty minutes before Cain's ARD hearing, the District Attorney approached Cain in the courtroom and handed her a release. The release had been unilaterally drafted by the District Attorney's office without consultation or discussion with Diane Cain's attorney. Diane Cain was simply told to sign the release as a condition for being admitted into the program that day. Donna Zaccaria, the attorney who accompanied Cain to the hearing, had never seen or even spoken with Diane Cain before meeting her in the courtroom the day of the ARD hearing. Zaccaria signed an affidavit, stating that she recalls reading the release, but does not recall whether she explained it to Diane Cain. Finally, the prosecutor kept the only existing copy of the agreement.[3]

This situation differs significantly from the position of the criminal defendant in *Rumery*. There, the defendant's own attorney had drafted the release. The defendant's attorney had negotiated with the town's attorney on the language of the release. The defendant's attorney had explained the release to the defendant for more than an hour. And the defendant was given the chance to think about the release for three days before signing it. In short, the decision of the criminal defendant in *Rumery* was not only voluntary, but also deliberate and informed.

---

[3] The fact that the prosecutor kept the only existing copy of the agreement does not in and of itself establish that Diane Cain did not sign the agreement voluntarily, but it does tend to support an inference that Cain was not fully informed about the agreement, particularly when her own attorney does not recall explaining the agreement to her.

On the other hand, we cannot say as a matter of law that Ms. Cain's actions were involuntary. First, Ms. Cain admitted her criminal activity, even bragged about how many officers it took to hold her down during her arrest. Second, she lied and said she had never been arrested before. Then, she made several efforts (through her brother, the President of the Borough Council, and the police chief) to have the criminal matter resolved. Cain had been arrested three times before and demonstrated "street smarts" with regard to the criminal process (that a lot of sophisticated businessmen would not have).

Additionally, she was represented by counsel. It is true that her attorneys seem to be saying different things about whether she knew the terms of the ARD program. But well before the preliminary hearing, Smith told her in general terms that to be admitted into ARD she would have to release the potential defendants from liability. There is also testimony that Zaccaria (the attorney who accompanied her to the ARD hearing) reviewed the waiver form with her line by line and told her that it meant that Cain would not be able to sue. While Smith and Zaccaria's affidavits imply that they have no knowledge of the release, there are factual questions on the issue. In sum, there are factual questions about voluntariness that require resolution for the jury.

We note that the best guarantee against involuntary release-dismissal agreements is judicial supervision. The majority in *Rumery* did not find it necessary to discuss this issue, but inadequate judicial supervision is a problem which we believe must be addressed here. We agree with Justice O'Connor's suggestion in *Rumery* that "the possibility of abuse is clearly mitigated if the release dismissal agreement is executed under judicial supervision." *Id.* at 402. Ideally the prosecutor should demonstrate to the criminal trial court that the agreement is the product of a voluntary, deliberate and informed decision by the defendant. Additionally, the prosecutor should file in court a copy of the agreement and should provide the criminal defendant with a copy as well.

Under these standards, the release-dismissal agreement between Diane Cain and the District Attorney's office of Delaware County was not executed under proper judicial supervision. As a preliminary matter, a copy of the agreement was never filed in court or given to Diane Cain. Moreover, in Delaware County criminal defendants are admitted en masse into the ARD program by the court on motion of the prosecutor. The procedure for such admission does not allow the court to adequately supervise the execution of release dismissal agreements. Finally, in Cain's case the court merely asked Diane Cain whether she understood the agreement. The court did not make even a preliminary inquiry into the circumstances under which the agreement was obtained from Diane Cain, nor did the court inquire whether the prosecutor had an independent legitimate reason for entering into the agreement directly related to his prosecutorial responsibilities.

Therefore, in this case judicial supervision cannot help the defendant establish voluntariness; voluntariness must turn on the other facts we have identified. However, we hold that henceforth, for a release-dismissal agreement between a criminal defendant and the prosecution to be enforceable the agreement must be subject to active judicial supervision by the criminal trial court at the time it is executed.

C.

PUBLIC INTEREST AND PROSECUTORIAL RESPONSIBILITY

In *Rumery*, the Supreme Court decided against a *per se* ban on release-dismissal agreements based on the reasoning that under certain circumstances these agreements served significant public interests. According to the plurality opinion, these public interests include protecting public officials from the burdens of defending against marginal and frivolous lawsuits. *Rumery*, 480 U.S. at 395. However, while the plurality opinion determined that one of the beneficial consequences of release-dismissal agreements is protecting public officials from unjust claims, nowhere does the plurality (or the majority) find that it is the function of a prosecutor to protect public officials from those claims. Indeed, the plurality acknowledged that it is prosecutorial misconduct for a prosecutor to be motivated to protect the interests of public officials or of the police. *Id*. at 395 n.5. According to the plurality, "the constituency of an elected prosecutor is the public" and not municipal officials or police officers. *Id.*

A preliminary question we need to address is whether showing that the agreement was entered into voluntarily is sufficient to uphold the waiver. The *Rumery* plurality specifically left that question open. The plurality did not need to address it because there was an independent law enforcement consideration counselling in favor of avoiding both the civil and criminal suit, namely preventing a victim of sexual harassment from testifying twice. The court held:

> *the prosecutor had an independent legitimate reason to make this agreement, directly related to his prosecutorial responsibilities.* The agreement foreclosed both the civil and criminal trials concerning Rumery, in which Deary would have been a key witness. She therefore was spared the public scrutiny and embarrassment she would have endured if she had to testify in either of those cases. Both the prosecutor and the defense attorney testified in the District Court that this was a significant consideration in the prosecutor's decision.

Id. at 398 (footnotes and citations omitted) (emphasis added).

We conclude, resolving the question left open in *Rumery*, that mere voluntariness is not enough, and that a valid law enforcement interest must be shown. More specifically, even when a release-dismissal agreement may shield public officials from a frivolous suit, for the agreement to be enforced as not adverse to the public interest, the prosecutor must have an independent legitimate reason to make this agreement directly related to his prosecutorial responsibilities. Moreover, the reason must be specific to the case, which means that a blanket policy such as that carved out by Delaware County District Attorney's office is not valid. In short, we believe that the proper reading of *Rumery* must be this: release-dismissal agreements may by their very nature further the public interest in protecting public officials and police officers from the burdens of defending frivolous lawsuits. But that is an incidental consequence and not a conclusive justification for enforcement of all such agreements. Simply put, protecting public officials from allegedly frivolous lawsuits is evidence but not proof that a release-dismissal agreement furthers the public interest. It must also be shown that the prosecutor had an independent legitimate reason for entering into the agreement directly related to prosecutorial responsibilities.

To hold otherwise would be to apply *Rumery* in a way in which the Supreme Court could not have intended. Since by definition all such agreements will shield public officials from frivolous *and* meritorious lawsuits, once it is shown that the agreement was signed voluntarily, a motion for summary judgment on the enforceability of a release-dismissal agreement would turn either into a full-fledged trial or into a premature judgment about the merits of the underlying civil rights claim. In our view, either result is undesirable. A full-fledged trial at the summary judgment stage to determine the enforceability of the agreement would wholly defeat the purpose of release-dismissal agreements by requiring public officials to defend on the merits even frivolous civil rights actions. A judgment by the court on the merits of the underlying claims short of a trial would pose the danger of courts disposing of meritorious civil rights cases without a full and fair investigation into the facts of these claims.

To use the case before us as an illustration, if, for the sake of argument, we were to assume that Diane Cain signed the release voluntarily, and if we accepted appellees' position that the release furthers the public interest merely if it shields officials of Darby, Yeadon and Colwyn boroughs from the burdens of defending a frivolous lawsuit, then, in order to determine whether the release is enforceable, this court would have to actually rule on the question of whether Diane Cain's § 1983 claim is frivolous. Neither we nor the district court can or should make such a ruling. It is clear that the record has not been fully developed on the merits of Diane Cain's § 1983 claim. The record is almost completely devoid of any evidence noting Diane Cain's injuries following her arrest. In addition, the police officers involved in her arrest have themselves not been deposed. Finally, there is conflicting testimony regarding the extent to which Diane Cain resisted arrest.

Obviously, at the stage of enforcing a release-dismissal agreement, it is not the business of the court to determine the merits of the underlying civil rights claim, just as, at the stage of executing a release-dismissal agreement, it is not the business of the prosecutor to determine whether the claim is frivolous. Accordingly, the prosecutor may not rely on the mere fact that public officials are shielded from allegedly frivolous lawsuits to justify the execution of release-dismissal agreements. The prosecutor must also have an independent legitimate reason for entering into the agreement that is directly related to prosecutorial responsibilities.

Here, the record developed thus far reflects no independent legitimate reason for the prosecutor to have entered into the agreement with Diane Cain directly related to his prosecutorial responsibilities. Wayne Punshon, the Chief of the ARD Division of the District Attorney's Office in Delaware County, testified as follows: The purpose of placing a criminal defendant in the ARD program is to "bypass the litigation that is involved in a criminal prosecution . . . and to proceed directly to what would be the outcome of the case in order to ease the burden of case loads on the court." The purpose of requiring a release from candidates of ARD is to "avoid the frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion." The policy and practice of the Delaware County District Attorney's office was to require, *always and without investigation*, a release from all ARD candidates in any potential claim against the police. In fact, according to Mr. Punshon, a person who otherwise qualifies in all respects for ARD, but who refuses to sign a release, will not be admitted into the program.

That is not enough to demonstrate that the prosecutor had an independent legitimate reason to require a civil release from Diane Cain directly related to his prosecutorial responsibilities. Appellees have admitted that candidates who otherwise qualify for ARD are refused admission into the program if they refuse to sign a release. Thus, the polestar of the ARD program, as implemented in Delaware County, seems to be, not easing of the burden of the criminal caseload on the court, but solely protecting public officials and police officers from civil suits. This is particularly evident in Diane Cain's case where Wayne Punshon, the Assistant District Attorney, without having interviewed Diane Cain, without having consulted her attorney, without having reviewed her file, and without any form of judicial supervision, simply handed her a release in the courtroom twenty minutes before moving for her admission into the ARD program.

In the final analysis, what the District Attorney's office does as a matter of policy and practice, as evidenced by the case before us, is precisely what the Supreme Court implicitly held in *Rumery* that it could not do. Whereas plaintiffs in *Rumery* had asked the court to ignore the circumstances under which the release-dismissal agreement was obtained, and to declare a blanket rule that such agreements are *per se* impermissible because of the potential for abuse, the District Attorney's office has instituted a policy whereby all such agreements are presumed to be *per se* permissible because of their potential benefits. In *The Misanthrope*, Moliere, the great French playwright, wrote: "Perfect good sense shuns all extremity, content to couple wisdom with sobriety."[4] In *Rumery*, the Supreme Court rejected the extreme view that release-dismissal agreements are *per se* adverse to the public interest. We see no reason why we should embrace the opposite extreme that release-dismissal agreements are *per se* beneficial to the public interest. However, inasmuch as we have invalidated the District Attorney's policy, defendants should be given the opportunity on remand to attempt a justification for use of the release-dismissal agreement in this particular case.

D.

BALANCING THE PUBLIC INTEREST

Nothing in our holding regarding the enforceability of release-dismissal agreements should be interpreted to mean that this court in any way disapproves of the ARD program in Delaware County or such similar diversion programs in other jurisdictions. We are well aware that these programs benefit both the criminal justice system as well as the individual criminal defendant. The criminal justice system benefits by having cases resolved without trial. The individual criminal defendant benefits by not being subjected to the full weight of criminal process for what may be a minor offense. Appellees claim that release-dismissal agreements are a necessary component of diversion programs such as the ARD program in Delaware County, and that a decision to invalidate the current agreement might threaten the existence of the ARD program. We are not convinced. The main purpose of the ARD program in Delaware county is to make effective use of scarce judicial resources by disposing without trial of a class of minor criminal cases. Release-dismissal agreements are but a secondary appendage to the ARD program. For the enforceability of release-dismissal agreements to threaten the existence of the ARD program would be like the proverbial tail wagging the dog.

---

[4] Moliere, *The Misanthrope*, Act I, scene 1.

Justice Powell identified the relevant public interest factors as "the public interests in protecting officials from the burdens of defending 'marginal and frivolous' § 1983 claims, and in resolving minor criminal charges and allocating scarce resources of the criminal justice system to the prosecution of more serious charges." The record in this case is inadequate for a determination one way or the other (as a matter of law) that the public interest requirement of *Rumery* was satisfied. To be sure, the district court erred by determining as a matter of law that it was satisfied; the District Attorney's invalid policy, the lack of a case-specific showing of the basis for obtaining the release, and the inadequacy of judicial supervision prevent such a conclusion. On the other hand, given the facts described above relating to Ms. Cain's efforts to obtain a settlement, her representation by counsel, neither can we conclude as a matter of law that the release does not meet *Rumery's* public interest requirement. Rather, the district court should give the parties an opportunity to expand the record, and should reconsider the issues in light of this opinion. We will therefore reverse the grant of summary judgment for the defendants and remand the case to the district court for further proceedings consistent with this opinion.

BECKER, *Circuit Judge*, concurring and dissenting.

I agree that the summary judgment in favor of the defendant should be vacated and the case remanded to the district court for further proceedings. I also join in the opinion of the Court, with three reservations.

First, I believe that the Court's requirement that the prosecutor must have a "legitimate independent reason" to enter into a release-dismissal agreement (directly related to prosecutorial responsibilities) is so formulated linguistically as to be susceptible to a more restrictive reading than is justified by *Rumery*. Obviously, the presence of a factor like that involved in *Rumery* (protecting a threatened witness from the embarrassment or burdens of testifying) would be sufficient to support a release-dismissal agreement. While I think that the (necessary) prosecutorial interest must be relevant to the case at bar so that the blanket policy carved out by the Delaware County District Attorney's office is invalid, I do not believe that the prosecutorial interest need be nearly so specific as in *Rumery*.

Both the plurality and Justice O'Connor's opinions in *Rumery* recognized that there can be a valid law enforcement interest in preventing resources from being drained into the defense of frivolous lawsuits, implying that such an interest would be sufficiently meritorious to justify judicial approval of such agreements. As I see it, demonstration that the particular defendant's civil rights claim was frivolous would be a case-specific factor demonstrating that public interest would be served by a waiver. There are doubtless other factors.

I agree that, inasmuch as we have invalidated the District Attorney's blanket policy, defendants should nonetheless be given the opportunity on remand to attempt a justification for use of the release-dismissal agreement in this particular case. As I see it this would be either by demonstrating the need to relieve public officials of the burden of defending *this* suit or demonstrating that the purpose of its use here was to dispose of a minor criminal case and to allocate scarce resources to the prosecution of more serious charges. While review of this evidence by the district court would require preliminary exploration of the ultimate merits at the summary judgment stage, it would do so at only a very low threshold to determine whether the plaintiff's case was plainly unmeritorious, hence it is not different from most civil cases in that regard. This, then, is my second reservation, for I do not share the Court's expressed concern about engendering pretrial exploration of the issues.

Third, while I agree that active judicial supervision should be encouraged, and that its presence or absence should be a factor to be considered in determining the validity of the release-dismissal agreements, I cannot agree with the imposition of the requirement that, in future cases, for a release-dismissal agreement between a criminal defendant and the prosecution to be enforceable, the agreement must be subject to active judicial supervision by the criminal trial court at the time it is executed. *Rumery* imposes no such requirement. Certainly an agreement may be seen to have been voluntarily entered into in the absence of judicial supervision (as the jury may find in this case). Moreover, the supervisory rule announced by the majority (it is not necessary to the decision in this case, hence it is not a holding) does not strike me as a prudent exercise of our supervisory power.

All that said, I have no concern that we have given inadequate guidance to the district court, for Judge Higginbotham agrees with the opinion of the Court on the "independent legitimate reason" formulation, so that there is a majority on that point, just as there is on the need for a jury determination on the voluntariness issue (Judges Nygaard and Becker). I note too my agreement with the opinion of the Court that the need for determination of this public interest balance requires vacatur of the district court's order, and a remand for further proceedings in accordance with the Court's opinion.

A. Leon Higginbotham, *Circuit Judge*, concurring in part, and dissenting in part.

I join in the court's opinion insofar as it holds that for a release-dismissal agreement to be enforceable, the party relying on the agreement must prove that the agreement was the product of a voluntary, deliberate and informed decision on the part of the criminal defendant, and that the prosecutor had an independent legitimate reason for entering into the agreement, directly related to prosecutorial responsibilities. I also join in the opinion insofar as it clearly holds that, henceforth in this circuit, for such an agreement to be enforceable the prosecutor must demonstrate to the criminal trial court at the time the agreement is executed that it satisfies the above requirements.

However, I do not join in the court's application of the above requirements to the facts of this case. And I do not join in the manner in which the court disposes of the case on remand. In my view, it is clear that the agreement was not the product of a voluntary, deliberate and informed decision on the part of Cain, and that the prosecutor did not have an independent legitimate reason for entering into the agreement, directly related to prosecutorial responsibilities. Accordingly, I would hold the agreement unenforceable as a matter of law.

I.

On the application of the requirement that the agreement be the product of a voluntary, deliberate and informed decision on the part of the criminal defendant, the court holds that it cannot say as a matter of law that Cain's actions were involuntary. In support for this holding, the court finds relevant that Cain had "admitted her criminal activity," that she had "even bragged about how many officers it took to hold her down during her arrest," "that she made several efforts to have the criminal matter resolved", that "she had been arrested three times before" that she "demonstrated 'streets smarts' with regard to the criminal process," and that "she was represented by counsel."

None of these factors, it seems to me are relevant on the question of whether Cain's decision to sign the release was voluntary, deliberate and informed. The fact that Cain had admitted her criminal activity and bragged about her arrest may arguably have some relevance on whether a jury would find in her favor on the merits of the claim. But it does not mean that she made a voluntary, deliberate and informed decision to release her rights. The fact that she lied about her arrest in order to get into ARD may at best tend to show that Cain was familiar with the general procedures of the ARD program. But it does not show that she was knowledgeable enough about release-dismissal agreements to have made a deliberate and informed choice about signing one after examining it for five minutes in court. The fact that she was anxious to settle the criminal matter may mean that she was afraid to spend her last days in jail. But it does not mean again that her decision to sign the release was voluntary or deliberate. The fact that she had "streets smarts" regarding the criminal process means that she had a criminal record. But that is not relevant to whether she made a deliberate and informed choice. Otherwise, every petty repeat-offender who passes through the criminal process would be deemed to be "sophisticated" about the process. After all, most criminals are usually thought to have "street-smarts." The truth is, however, that those criminals may be victims of their own shortcomings, they may be victims of economic deprivation, or they may be victims of the criminal process itself. But they certainly cannot be deemed to be as sophisticated as the members of society who, through the benefit of education, understand the criminal justice system and who, through the benefit of wealth, are able to command the attention of an attorney to guide them step by step through the system.

Diane Cain talked with an attorney once about the possibility that she might be required to sign a release as a condition for ARD. That attorney did not advise Cain to sign a release, nor does he recall explaining to Cain the full consequences of signing a release. The next time Cain contemplated a release was in court. The prosecutor handed her a release which had been unilaterally drafted by the District Attorney's Office of Delaware County without prior notice to or consultation with Cain's attorney. An attorney she had never met before read it with her for five minutes and she signed it. That attorney also does not recall explaining to Cain the full consequences of signing a release. At a minimum, and as a matter of law, such a release under the facts of this case cannot be the product of a voluntary, deliberate and informed decision. Even if Cain's signing of the release could be considered "not involuntary," to be sure it cannot be said to have been deliberate and informed.

II.

On the requirement that the prosecutor have an independent legitimate reason for entering into the agreement, directly related to prosecutorial responsibilities, the court again writes that it cannot find on the basis of the present record that, as matter of law, the prosecutor did not have an independent legitimate reason to enter into the agreement directly related to prosecutorial responsibilities. I cannot agree with this conclusion. The record reveals that between eighteen to thirty other defendants were admitted into the ARD program along with Diane Cain in one collective session in court. The record also reveals that the district attorney used a pre-printed release form for all the defendants who were asked to sign a release and then read them the same ten-minute explanation of the ARD program. Punshon, the director of the ARD admitted that he only spoke to the police regarding Cain's arrest, that he did not investigate the circumstances of her arrest, and that he was not aware of the extent of her injuries. Punshon also admitted that Cain was asked to sign a release because she was arrested during what the police considers to be a "domestic disturbance." According to Punshon, all individuals arrested during domestic disturbances are asked to sign a release because domestic disturbances tend to produce civil rights claims.

This, in my view, makes it clear that the prosecutor did not have an independent legitimate reason for requiring the release. Diane Cain was asked to sign the release because the District Attorney's Office of Delaware County has adopted a policy of requiring releases from all ARD candidates. By definition, such a wholesale policy cannot possibly be based on any independent legitimate reason, directly related to prosecutorial responsibilities.

III.

By remanding this case to the district court on the issue of whether the release agreement should bar Cain's § 1983 claim, this court creates one of two outcomes, neither of which is desirable.

The first outcome is that a remand may mean that the district court should once again hold a hearing on the issue. Respectfully, I do not believe this to be a wise (or necessary) course. Already, the district court has conducted four days of hearing on this issue. During the hearing all relevant witnesses testified: Digregorio (Cain's brother), Punshon (the Chief of the ARD Division in Delaware County), Smith (Cain's attorney during the criminal proceedings), Zaccaria (the attorney who accompanied Cain to the ARD hearing), and Smythe (the Chief of Police). In addition, the court considered Cain's own videotaped deposition and the deposition of her husband Charles Cain. Finally, the court had at its disposal affidavits from Smith, Zaccaria and Punshon. It is thus clear that the district court very diligently and thoughtfully developed the factual record in order to rule on the issue of whether the release agreement should be enforced. The record, it seems to me, cannot be further developed for the district court to make another ruling on the issue.

In the alternative, the second outcome is that our remand to the district court may mean that the court should allow the case to proceed to trial on the merits of Cain's § 1983 claim and permit the jury to decide whether the agreement should be enforced. This seems to be the more likely of the two possible outcomes on remand. But it is as undesirable as the first. To allow a jury to decide whether the agreement should be enforced would seem to go against the basic philosophy of *Rumery*, since it would mean that the question of whether the agreement should be enforced would inevitably be resolved only after a full-fledged trial on the merits of Cain's § 1983 claim.

IV

In conclusion, I would point out that I wholeheartedly agree with the court that it is not the business of the prosecutor to shield officials from civil rights lawsuits. And I also agree that it is unwisely premature for the court to rule the merits of plaintiff's civil rights' claim at the stage of determining whether a release-dismissal agreement should be enforced. In short, I agree with the court that we should give *Rumery* a restrictive reading so as to require that the agreement be the product of a voluntary, deliberate and informed decision, and so as to require the prosecutor to show that there existed an independent legitimate reason for entering into the agreement, directly related to prosecutorial responsibilities.[1] I simply disagree with the manner in which the court has applied these requirements to the facts of this case. On the facts of this case, I would hold that the agreement, as a matter of law, does not satisfy the requirements of *Rumery*.

---

[1] Of course, I disagree with Judge Becker's observation that a showing by the prosecutor of "a need to relieve public officials of the burden of defending this suit or ... to dispose of a minor criminal case" is sufficient to demonstrate an independent legitimate reason for entering into the agreement, directly related to prosecutorial responsibilities. To my view, the prosecutor must articulate a legitimate law enforcement purpose for entering into the agreement. Protecting public officials from the burdens of defending civil rights claims is

---

not such a purpose. Indeed, there is much merit in Professor Seth Kreimer's perceptive comment that "[f]or a prosecutor to request a release as a means of protecting the police from what she regards as unwarranted civil rights litigation is an extortionate attempt to license the exercise of power unimpeded by the rule of law." Kreimer, *Release, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U.Pa.L.Rev. 851, 935 (1988). Professor Kreimer's article is cited in the court's opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 17, 1992.

Charles CAIN, Executor of the Estate of Diane Cain and Charles Cain in his own right

v.

DARBY BOROUGH, et al.

Civ. A. No. 91-1583.

United States District Court,
E.D. Pennsylvania

Jan. 17, 1992.

Robert J. Casey, Jr., Mylotte, David & Fitzpatrick, Philadelphia, PA, for plaintiff.

Thomas K. Ellixson, Robert G. Hanna, Jr., Marshall, Dennehy, Warner Coleman & Goggin, Jeffrey P. Hoyle, William F. Holsten, II, Holsten & White, Media, PA, for defendants.

MEMORANDUM

Appendix C

LUDWIG, District Judge.

Defendants Darby Borough, Darby Borough Police Department, Officer Robert Boyden, Officer John Chappelle, Officer Cory Kramer; and Yeadon Borough, Yeadon Borough Police Department and Sergeant Robert Frazier moved for summary judgment. Fed.R.Civ.P. 56.[1] Defendants Colwyn Borough, Colwyn Borough Police Department and Officer Salvatore Nucifora joined with them.[2]

On March 12, 1991, plaintiffs Diane Cain, now deceased, and her husband, Charles Cain, filed this action under 42 U.S.C. § 1983, asserting a violation of Diane Cain's civil rights when she was arrested on July 4, 1989.[3] The amended complaint also alleges supplemental state tort claims and a derivative claim on behalf of Charles Cain.[4]

---

[1] Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of showing that there is no triable issue. The opposing party must point to specific, affirmative evidence in the record—and not simply rely on allegations or denials in the pleadings—in order to defeat a properly supported motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Williams v. Borough of West Chester*, 891 F.2d 458, 464 (3d Cir.1989).

[2] Counsel for plaintiff agreed to allow Colwyn defendants to join in Darby's and Yeadon's motions for summary judgment so as to be before the court at one time. Trial Transcript Sept. 24, 1991 at 109-11.

[3] Jurisdiction is federal question. 28 U.S.C. § 1331.

[4] Upon Diane Cain's death in April 1991, which was unrelated to the facts of this case, Charles Cain was substituted as executor of her estate.

Defendants' summary judgment motions contend that on October 18, 1989 Diane Cain released any civil claim she had resulting from her arrest by the police on July 4, 1989 and the ensuing criminal charges.[5] On September 27, 1991, upon evidentiary hearing, defendants' motions were granted.

I.

The following fact findings are made:

1. On July 4, 1989 a friend of Diane Cain's daughter, Joe Wettlaufer, allegedly stole money belonging to Diane Cain. Diane Cain called her husband, from whom she was separated, and he arrived at her home shortly thereafter. He told her he had a gun. Charles Cain and Joe Wettlaufer left the house. Diane Cain deposition Mar. 13, 1991 at 24-28.

2. Diane Cain telephoned the police and reported that her husband, Charles Cain, was armed with a gun and was chasing Joe Wettlaufer. Diane Cain deposition Mar. 8, 1991 at 24.

3. In response, officers from the Darby, Yeadon and Colwyn Borough Police Departments came and arrested Charles Cain. Diane Cain deposition Mar. 13, 1991 at 98.

4. Driving her car Diane Cain saw her husband's car in a nearby parking lot, and a number of police were there. *Id.* at 29-30. When she asked where her husband was and the officers did not respond, she cursed at them. *Id.* at 31. She was told if she did not leave, she would be arrested. Subsequently, she was arrested and

---

[5] The release was left in the prosecutor's file, and counsel in this action were unaware of its existence until July, 1991. Trial transcript Sept. 18, 1991 at 131-32.

bit an officer's hand as he reached inside her car to shut off the ignition. *Id.* at 99-101. As a result, Diane Cain was charged with three counts of aggravated assault as well as simple assault, resisting arrest and disorderly conduct.

5. Thereafter, she told her brother, Nicholas DiGregorio, who was president of Darby Borough Council and deputy warden at Delaware County Prison, that she caused the incident, bit the officer, and resisted arrest. Trial transcript Sept. 16, 1991 at 22-23. She told him she wanted to resolve the criminal charges against her and did not want to lose her good relationships with the officers. *Id.* at 25, 28. She also told her brother she did not want to sue anyone as a result of the incident. *Id.* at 36.

6. The police chief of Darby Borough knew Diane Cain for 25 or 30 years and they were friends. Trial transcript Sept. 23, 1991 at 3-4. She spoke with him that summer and asked for his advice. *Id.* at 6, 17. She said she wanted the criminal charges to be dropped, *id.* at 17, and that she would not sue the police department. *Id.* at 65. Chief Smythe told her that if she went on ARD, she would not be able to sue the police. *Id.* at 24.

7. The Accelerated Rehabilitative Disposition or ARD program is an alternative way to resolve criminal charges in a specified range of cases. It effectuates pretrial diversion. A person is placed on ARD by a judge on motion or consent of the prosecutor. Upon satisfactory completion of the program, the charges against the individual are dismissed. *See Commonwealth v. Lutz,* 508 Pa. 297, 495 A.2d 928 (1985).

8. G. Guy Smith, Esq., represented Diane Cain in the criminal charges. An experienced criminal attorney, he was admitted to the bar in 1968. Trial transcript Sept. 18, 1991 at 53-54. On July 5,

1989, Smith met with Diane Cain and her husband. *Id.* at 54.

9. Smith met again with Diane Cain at her preliminary hearing. She made clear to Smith she wanted to be placed on ARD. He advised her the police would want a release from her because "they're not going to let you get ARD and then let you sue them." *Id.* at 58. Diane Cain responded that she wanted ARD and did not want a trial. *Id.* at 58-59.

10. An affidavit signed by Smith on September 5, 1991 states he never advised Diane Cain to release any rights or claims regarding civil rights violations in exchange for acceptance into the ARD program nor did he authorize any attorney from his office to advise Diane Cain to execute a release of these claims. The affidavit was prepared by plaintiff's present counsel. It also states Smith understood that Diane Cain intended to pursue her claim against various police departments and police officers. Plaintiff's exibit 7.

11. In signing this affidavit, Smith intended to say he was not personally aware of any civil release signed by Diane Cain and whether she was going to sue anyone "was up to her at that point." Trial transcript Sept. 18, 1991 at 100-101. Smith's associate and not Smith represented Diane Cain at the hearing at which she was placed on ARD. *See* finding 18-23 *infra.*

12. During August 1989, Smith spoke to the Darby Borough police chief about having the aggravated assault charges withdrawn. In Smith's opinion, Diane Cain would not be recommended for ARD if the aggravated assault charges persisted. Trial transcript Sept. 18, 1991 at 55.

13. At her preliminary hearing, the aggravated assault

charges were withdrawn at the request of the Darby Borough police, and Diance Cain waived the hearing as to the other charges. Trial transcript Sept. 24, 1991 at 16-17. On September 19, 1989, Diane Cain agreed to waive her speedy trial rights under Pa.R.Crim.P. 1100 in order to be considered for ARD. Defendants' exhibit D.

14. W. Wayne Punshon, Esq., is an assistant district attorney and chief of the ARD Division in Delaware County. Trial transcript Sept. 16, 1991 at 59-60. Punshon recommended ARD in Diane Cain's case conditioned on her giving a release of liability for police conduct on July 4, 1989. Trial transcript Sept. 18, 1991 at 9-10. The unwritten policy of the Delaware County District Attorney's office was not to recomend ARD if the defendant would not sign a civil release. Trial transcript Sept. 16, 1991 at 97-98.

15. In her application for ARD, Diane Cain represented that she had "never been arrested or charged with any criminal or vehicular offense" except for the July 4, 1989 charges. Defendants' exhibit E. Diane Cain was arrested for retail theft on December 7, 1982; April 4, 1983; and November 30, 1987. Defendants' exhibit B.

16. Diane Cain received ARD for the retail theft offense of November 30, 1987. Defendants' exhibit K. Punshon would not have recommended ARD for Diane Cain on the July 4, 1989 charges had he known she received the previous ARD. Trial transcript Sept. 16, 1991 at 75.

17. Donna Zaccaria, Esq. is an attorney employed by Smith and was admitted to the bar in 1988. Trial transcript Sept. 18, 1991 at 133-34.

18. On October 18, 1989, Diane Cain appeared for an ARD hearing before Judge Prescott in the Delaware County Court of Common Pleas. Smith authorized Zaccaria to attend the hearing for him. *Id.* at 134, 139.

19. Prior to the hearing, Diane Cain met with Donna Zaccaria and signed a one-page document entitled "General Release." The top contained the caption of the case and listed the charges as "Simple Assault, Resisting Arrest and DC Harm." The body of the release is in type—with the underlined portion in handwriting:

> I, the undersigned Defendant, for the sole consideration of One Dollar ($1.00), receipt of which is acknowledged, and for being accepted into the A.R.D. Program in the above-captioned matter, do hereby remise, release, and forever discharge *Officer Cory Kramer, Officer Robert Boyden and Officer John Chapelle (sic) as well as the Darby Boro Police Dept.* their heirs, executors and administrators (or its successors and assigns), of and from any and all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claim and demands whatsoever in law or equity, which have resulted or which may develop in the future in connection with he (sic) incident which occurred and led to the filing of charges in the above-captioned matter.
>
> IN WITNESS WHEREOF, I have here unto set my hand and seal this *18* day of *October 1989.*

Diane Cain's purported signature appears below. Defendants' exhibit H. Underneath her signature, it states:

> I, the undersigned Attorney, hereby aver that I represent the above Defendant. I further aver that I have reviewed this Release with my client, that he (sic) has signed it in my presence, and that I believe he (sic) fully understands its contents.

Under this paragraph, on the line for attorney for the defendant, Zaccaria signed the document "Donna Zaccaria for G. Guy Smith." Defendants' exhibit H.

20. The general release was a form provided by the district attorney's office on which the officers' names and police department and the date were handwritten. Trial transcript Sept. 18, 1991 at 6; defendants' exhibit H. As verified by Nicholas DiGregorio, the signature on the release was that of his sister, Diane Cain. Trial transcript Sept. 24, 1991 at 38-39.

21. Zaccaria does not specifically recall the events of that day. However, it was always her practice to explain to clients the meaning of the general release before having them sign it. She would not sign the general release herself unless the client had signed it in her presence. Trial transcript Sept. 18, 1991 at 136-138.

22. On October 18, 1989, Diane Cain was present when Punshon gave a 10-minute explanation of the ARD program. The presentation is made to the applicants collectively immediately before they are individually processed. *Id.* at 4-5, 11.

23. At the October 18, 1989 hearing, a colloquy as to Diane

Cain's plea agreement was conducted before Judge Prescott. Zacaria asked Diane Cain if she understood the ARD program and whether, if she violated her probation, she could be brought to trial and recharged. She was also asked if she wished to be placed in the ARD program. She responded affirmatively to these questions. Punshon summarized the criminal charges, noted the police did not object and that Diane Cain had released them from all civil liability, and moved her admission. The judge approved the application and placed her on three months' probation. Defendants' exhibit G.

24. The October 18, 1989 hearing was tape recorded. On the tape, Punshon is heard to say to Judge Prescott: "She has released them [referring to the police] from all civil liability." He is not heard to say "she is released, then, from all civil liability."[6] Both Punshon and Zaccaria understood Punshon to mean that Diane Cain had released the police from civil liability. Defendants' exhibits I & J.

II. The Validity of the Release

The controlling issue concerns the release's enforceability. Authoritative guidance comes from *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), which held that a release of a civil rights claim given in exchange for dismissal of criminal charges is not per se invalid.

In *Rumery*, the complainant in a criminal case was the alleged victim of a sexual assault. Bernard Rumery, who was a friend of the criminal defendant, allegedly telephoned the victim to dissuade her from testifying. Rumery was arrested and charged with witness tampering. An agreement was reached to dismiss the charges against him in return for a release of any claims he might have against the town, its officials, or the victim in connection with his arrest. Ten months later, he filed a § 1983 suit against the town and its officers for his arrest, defamation and imprisonment. The district court's order dismissing the suit on the basis of the release-dismissal agreement was upheld because (1) the agreement was voluntary; (2) there was no evidence of prosecutorial overreaching; and (3) the relevant public interests would not be adversely affected. *Id.* at 397-98, 107 S.Ct. at 1194-95.

---

[6] Both Punshon and Zaccaria submitted affidavits that Punshon had said "she has released them"—meaning the police. This is also what I heard on the tape. Plaintiff's trial counsel contends that the tape recording has Punshon saying "she is released then." Trial transcript Sept. 18, 1991 at 33.

In Diane Cain's criminal case, unless she violated her ARD probation, the eventual result was dismissal of the charges. Pa.R.Crim.P. 185. The validity, therefore of the release given by her depends on whether the three *Rumery* requirements are fulfilled. The burden of proof appears to be on the releasee. 480 U.S. at 401, 107 S.Ct. at 1196 (O'Connor, J., concurring).

1. Voluntariness

Rumery: "Many factors may bear on whether a release was voluntary." *Id.* at 401, 107 S.Ct. at 1196 (O'Connor, J., concurring). As the four-justice plurality noted. Rumery was represented by an experienced criminal lawyer; he was not in jail when he signed the agreement; he had time to consider it before signing; his lawyer drafted the agreement; he was a sophisticated businessman. *Id.* at 394, 107 S.Ct. at 1192-93. Justice O'Connor's concurrence also stressed the knowledge and experience of the criminal defendant; the circumstances of the execution of the release, including whether defendant was represented by counsel;

whether the release was executed under judicial supervision; and the severity of the criminal charge as a gauge of its coercive effect. *Id.* at 401-402, 107 S.Ct. at 1196-97.

These factors favor enforcement of Diane Cain's release. Diane Cain was represented by counsel throughout the entire criminal process. When her attorney spoke to her on the morning of the preliminary hearing, he told her "they're not gonna let you go on ARD and then turn around and sue them." Trial transcript Sept. 24, 1991 at 17.[7] When he asked if she still wanted him to go forward, "[t]he words that she said to me told me she wanted me to go do what I was telling her I was gonna go do." *Id.* at 16. That discussion occurred in August of 1989, well before the hearing on October 18, 1989, giving Diane Cain sufficient time to consider whether she wanted to pursue ARD and, in doing so, give up any claim against the police.

Other factors comport with *Rumery.* Diane Cain was not in custody when she executed the release. While she may not have been a sophisticated business person, her brother's description of her suggested she was street-wise and active in the community. Also, she was familiar with ARD having been in the program in 1988.

A Fifth Circuit decision applying *Rumery* is instructive on voluntariness. There, an inmate's agreement not to sue for injuries sustained in a county jail fire was upheld. In exchange, the county had agreed to a sentencing recommendation of parole for four felonies and the reduction of an arson charge to destruction of public property. *Berry v. Peterson* 887 F.2d 635 (5th Cir.1989). Given *Rumery*, the court found no evidence of coercion. The criminal charges were made before the § 1983 action was filed or threatened. The inmate expressed no unwillingness at the time the release was given. These factors exist here as well.

---

[7] In Pennsylvania, the prosecutor's motion is a prerequisite for ARD. *See Commonwealth v. Stranges,* 397 Pa.Super. 59, 579 A.2d 930 (1990); *see* discussion *infra* at pp. 1202-1203.

On the other hand, there was no persuasive evidence that Diane Cain did not act voluntarily in executing the release. The affidavit signed by her attorney Smith to the effect that she may have intended to sue was explained and reconciled in Smith's and his associate's testimony.[8]

2. *Public Policy*

The public policy for ARD is set forth in the Pensylvania Rules of Criminal Procedure:

> The primary purpose of this program is the rehabilitation of the offender; secondarily, the purpose is the prompt disposition of charges, eliminating the need for costly and time-consuming trials and other court proceedings. These rules contemplate that ordinarily the defendants eligible for the ARD program are first offenders who lend themselves to treatment and rehabilitation rather than punishment and that the crime charges is relatively minor and does not involve a serious

---

[8] Plaintiff's counsel did not concede that Diane Cain had signed the release. Trial transcript Sept. 16, 1991 at 6-7. However, plaintiff, who must have been familiar with his wife's signature as well as other important facts regarding the release, did not testify. Trial transcript Sept. 24, 1991 at 148.

> breach of the public trust. The program is intended to encourage offenders to make a fresh start after participation in a rehabilitative program and offers them the possibility of a clean record if they successfully complete the program . . . . In general, the District Attorney has the responsibility for determining which cases will be recommended into the ARD program.

Pa.R.Crim.P. 159 (Accelerated Rehabilitative Disposition-Summary Cases, Committee Introduction) (1991).

The chief of the Delaware County ARD Division testified as to the purpose of the civil release in ARD cases. It "is to bypass the litigation that is involved in a criminal prosecution . . . and to proceed directly to what would likely be the outcome of the case in order to ease the burden of case loads on the [c]ourts." Trial transcript Sept. 16, 1991 at 71. He continued:

> [I]t's in the interests of the prosecutor's office and the police to avoid the needless litigation and ofttimes (sic) frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing . . . . That is why a release is required from situations where it may be reasonably anticipated that litigation will subsequently arise after the individual is . . . given ARD. It would, indeed, be somewhat of a disservice to the law enforcement community to offer this individual a program by which she avoids prosecution and she avoids conviction only to

> then produce evidence of prosecutorial coercion or misconduct, plaintiff instead relied on the possibility that Diane Cain was influenced by the opportunity of a dismissal of her criminal charges. This factor alone, however, without evidence of misconduct or overbearing, does not make the release invalid.

The prosecutor here enunciated why his office requires releases before recommending ARD for this type of case:

> In this particular kind of case, what we are dealing with here is a domestic situation where, undoubtedly, emotions run high. We are dealing with in—I don't know what percent—but, in an extraordinary high percent of cases where the people, the complainants or the defendants are intoxicated. And, they may very well remember things differently—I'm not saying that in this particular case, but I'm talking about this class of cases.

Trial transcript Sept. 16, 1991 at 72. Given this commonly accepted perspective, he exercised discretion to avoid further litigation and the burdening of available resources, a recognized factor in *Rumery.*

III. The Scope of the Release

Familiarly, "the intention of the parties to a written release is paramount." *Sparler v. Fireman's Ins. Co. of Newark, N.J.*, 360 Pa.Super. 597, 601, 521 A.2d 433, 435, (1987), *appeal denied,* 518 Pa. 613, 540 A.2d 535 (1988) (superseded by statute on other grounds). "It is establised law that a release normally encompasses only such matters which may fairly be said to have been within the contemplation of the parties when the release was given." *Hower v. Whitmak Associates,* 371 Pa.Super. 443, 449, 538 A.2d 524, 527 (1988).

Here, the release provides for the discharge of liability for certain named officers and the Darby Borough Police department in connection with the July 4, 1989 incident. Diane Cain's counsel Smith understood that the release was a general release: "You were releasing everybody in exchange for getting ARD." Trial transcript Sept. 24, 1991 at 13. There was no limitation. *Id.*

Donna Zaccaria, who explained the release to Diane Cain and was present when both of them signed it, understood the "intent in executing the release was to release all police officers involved in the incident of July 4th of 1989." Trial transcript Sept. 24, 1991 at 21. It also was intended to release "police officers and any municipalities that they worked for." *Id.* at 32. Zaccaria testified that, as a matter of invariable practice, she would have explained to Diane Cain that the release applied to all those police involved in the incident, not only those identified in the release. Trial transcript Sept. 18, 1991 at 146.[10]

The evidence shows that the parties intended the October 18, 1989 release to extend to and cover all of Diane Cain's claims of civil liability arising from police conduct on July 4, 1989. Accordingly, the release, as asserted, is a complete bar to the present action.

---

[10] Zaccaria testified that the names listed on the release were those provided by the district attorney's office. Trial transcript Sept. 18, 1991 at 138.